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REVISED CODES OF MONTANA

VOLUME 7 1963 Pocket Supplement

Containing

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE
THIRTY-EIGHTH LEGISLATIVE ASSEMBLY

AND

ANNOTATIONS SUPPLEMENTING THE PARENT VOLUME
AND THE 1961 CUMULATIVE POCKET SUPPLEMENT
THROUGH VOLUME 377, PACIFIC
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1963 Pocket Supplement

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CHAPTER 2—SUPREME COURT

93-216. (8805) Powers and duties of supreme court on appeals.

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In equity cases the supreme court will not disturb the trial court's findings where there is substantial evidence to support them, and will not overturn findings unless there is a decided preponderance of the evidence against them. *Favero v. Wynacht*, — M —, 371 P 2d 858, 868.

Review of Equity Cases

The supreme court in reviewing equity

cases will hesitate to overturn findings of the trial court based upon substantial conflicting evidence which would justify an inference in favor of either side of the controversy. *Bouma v. Bynum Irr. Dist.*, 139 M 360, 364 P 2d 47, 49.

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Enott v. Hinkle, — M —, 369 P 2d 413, 414.

CHAPTER 3—DISTRICT COURTS

- Section 93-302. Number of judges.
- 93-303. Salaries of district judges.

93-302. (8813) Number of judges. In each judicial district there must be the following number of judges of the district court, who must be elected by the qualified voters of the district, and whose term of office must be four (4) years, to wit: In the first, second, eleventh and sixteenth, two judges each, in the thirteenth, eighth and fourth, three judges, and, in all other districts, one judge each.

On or before April 1, 1963, the governor of this state shall designate and appoint a judge of the fourth judicial district who shall hold office

until the general election to be held during the year 1964, and until his successor is elected and qualified.

History: En. Sec. 1, p. 156, L. 1901; re-en. Sec. 6264, Rev. C. 1907; re-en. Sec. 8813, R. C. M. 1921; amd. Sec. 2, Ch. 91, L. 1929; amd. Sec. 1, Ch. 18, L. 1955; amd. Sec. 1, Ch. 91, L. 1957; amd. Sec. 1, Ch. 161, L. 1959; amd. Sec. 1, Ch. 229, L. 1963.

Amendment

The 1963 amendment increased the number of judges in the fourth district from two to three; deleted temporary provisions for the initial appointment and election of the third judge in the eighth district and the second judge in the eleventh district; added the second paragraph; and made minor changes in phraseology.

93-303. (8814) Salaries of district judges. The annual salary of each district judge shall be fourteen thousand dollars (\$14,000.00).

History: En. Sec. 1, Ch. 176, L. 1919; re-en. Sec. 8814, R. C. M. 1921; amd. Sec. 1, Ch. 114, L. 1947; amd. Sec. 1, Ch. 84, L. 1951; amd. Sec. 1, Ch. 247, L. 1955; amd. Sec. 1, Ch. 198, L. 1959; amd. Sec. 1, Ch. 187, L. 1961; amd. Sec. 2, Ch. 212, L. 1963.

Repealing Clause

Section 3 of Ch. 212, Laws 1963 read "Section 72-106, R. C. M. 1947, and all other acts and parts of acts in conflict herewith are hereby repealed."

Effective Date

Amendment

The 1963 amendment increased the salary from \$10,700 to \$14,000.

Section 4 of Ch. 212, Laws 1963 read "This act shall take effect and be in force on and after July 1, 1964."

CHAPTER 5—GENERAL PROVISIONS RESPECTING THE POWERS, PROCEEDINGS AND HOLDING OF COURTS OF JUSTICE

93-502. (8845) Courts of record may make rules.

Extension of Time to File Bill of Exceptions

A district court may not condition the extension of time authorized by section 93-5505 by requiring an order for a

transcript from the court reporter and a deposit of his estimated cost. State ex rel. Ryan v. District Court, — M —, 368 P 2d 802, 804.

CHAPTER 9—DISQUALIFICATION OF JUDICIAL OFFICERS

Section 93-901. Cases in which judge may be disqualified—calling in another judge.
93-902. Certain officers not to practice law.

93-901. (8868) Cases in which judge may be disqualified—calling in another judge. Any justice, judge, or justice of the peace must not sit or act as such in any action or proceeding:

1. To which he is a party, or in which he is interested;
2. When he is related to either party by consanguinity or affinity within the sixth degree, computed according to the rules of law;
3. When he has been attorney or counsel for either party in the action or proceeding, or when he rendered or made the judgment, order, or decision appealed from;
4. When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge. Such affidavit may be made by any party to an action, motion, or proceeding, personally, or by his attorney or agent, and shall be filed with the clerk of the district court in which the same may be

pending. In any judicial district having only one judge the affidavit of disqualification with reference to any action or proceeding to be tried before a jury must be filed at least one day before the day appointed or fixed by the court for setting the trial calendar; provided, however, this limitation shall not apply unless notice of such setting date shall be given to all parties by the clerk of the district court at least fifteen (15) days prior thereto. In all other cases the affidavit must be filed at least fifteen (15) days before the day appointed or fixed for the hearing or trial of any such action, motion, or proceeding (provided such party shall have had notice of the hearing of such action, motion, or proceeding for at least the period of fifteen (15) days and in case he shall not have had notice for such length of time, he shall file such affidavit immediately upon receiving such notice). Upon the filing of the affidavit, the judge as to whom said disqualification is averred shall be without authority to act further in the action, motion, or proceeding, but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the action or proceeding to some other court, nor to the power of calling in another district judge to sit and act in such action or proceeding, providing that no judge shall so arrange the calendar as to defeat the purposes of this section. No more than two judges can be disqualified for bias or prejudice, in said action or proceeding, at the instance of the plaintiff, and no more than two at the instance of the defendant, in said action or proceeding, and this limitation shall apply however many parties or persons in interest may be plaintiffs or defendants in such action or proceeding. If there be more than one judge in any judicial district in which said affidavit is made and filed, upon the first disqualification of a judge in the cause, another judge, residing in the judicial district wherein the affidavit is made and filed, must be called in to preside in such action, motion, or proceeding; and upon the second or any subsequent disqualification of a judge in the cause, a district judge of another judicial district of the state must be called in to preside in such action, motion, or proceeding, or the action, motion, or proceeding transferred to a district judge of another judicial district of the state; when another judge has assumed jurisdiction of an action, motion, or proceeding, the clerk of the district court in which the same was pending, shall at once notify the parties or their attorneys of record in the same, either personally or by registered mail, of the name of the judge called in, or to whom such action, motion, or proceeding was transferred. Such second or subsequent affidavit of disqualification shall be filed with the clerk of the district court in which such action, motion or proceeding may be pending within three days after the party or his attorney of record, filing such affidavit, has received notice as to the judge assuming jurisdiction of such action, motion, or proceeding.

History: Ap. p. Sec. 453, p. 134, *Bannack Stat.*; re-en. Sec. 610, p. 159, *Cod. Stat.* 1871; re-en. Sec. 530, p. 179, *L.* 1877; re-en. Sec. 530, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 547, 1st Div. *Comp. Stat.* 1887; amd. Sec. 180, *C. Civ. Proc.* 1895; amd. Ch.

3, 2nd Ex. *L.* 1903; re-en. Sec. 6315, *Rev. C.* 1907; amd. Sec. 1, Ch. 114, *L.* 1909; re-en. Sec. 8868, *R. C. M.* 1921; amd. Sec. 1, Ch. 93, *L.* 1927; amd. Sec. 1, Ch. 218, *L.* 1961; amd. Sec. 1, Ch. 82, *L.* 1963. *Cal. C. Civ. Proc.* Sec. 170.

Amendment

The 1963 amendment substituted "fifteen (15) days" for "five days" in two places in the fourth sentence of subd. 4.

Filing of Affidavit—Effect

When an affidavit of disqualification was filed against the presiding judge by the defendant corporation the judge lost all jurisdiction of the cause except as to the arrangement of the calendar and the power of calling in another district judge to sit and act in the proceedings. *Williams v. Widows and Orphans Home, Veterans of Foreign Wars, of Eaton Rapids, Mich.*, — M —, 373 P 2d 948, 949.

Provisions Not Applicable to Criminal Proceeding

This section is applicable only in civil cases. In a criminal proceeding, the proper statute under which a defendant may disqualify a judge is section 94-6913. In *re Larocque's Petition*, 139 M 405, 365 P 2d 950, 951.

93-902. (8869) Certain officers not to practice law. No justice, or judge of a court of record, county clerk, or clerk of any court, or sheriff, shall practice law in any court in this state, nor act as attorney, agent, or solicitor in the prosecution of any claim or application for lands, pensions, patent rights, or other proceedings before any department of the state or general government, or courts of the United States, during his continuance in office, nor shall any justice of the peace practice law before any justice's court in the county in which he resides. Provided, further, that no justice or judge of a court of record, shall act as administrator or executor of any estate for compensation.

History: Ap. p. Secs. 454, 455, p. 134, *Bannack Stat.*; re-en. Secs. 611, 612, p. 159, *Cod. Stat.* 1871; re-en. Secs. 531, 532 p. 179, L. 1877; re-en. Secs. 531, 532, 1st Div. Rev. Stat. 1879; re-en. Secs. 548, 549, 1st Div. Comp. Stat. 1887; re-en. Sec. 181, C. Civ. Proc. 1895; re-en. Sec. 6316, Rev. C. 1907; re-en. Sec. 8869, R. C. M. 1921;

Right of Intervener to Disqualify Judge

Where the original defendants who disqualified one judge, and the interveners, who had disqualified another judge, had become parties or persons in interest within the meaning of this section, a third disqualifying affidavit was invalid. *Allman v. Potts*, — M —, 371 P. 2d 11, 13.

An intervener, being a party to the action, is entitled to avail himself of the provisions of this section and in a proper situation may file an affidavit of disqualification. *Allman v. Potts*, — M —, 371 P 2d 11, 13.

Time for Disqualification

A trial judge may be disqualified after the return of a verdict and before the motion for a new trial has been made. *State ex rel. Bellon v. District Court*, — M —, 373 P 2d 314, 316.

amd. Sec. 1, Ch. 23, L. 1963. *Cal. C. Civ. Proc. Sec. 171.*

Amendment

The 1963 amendment substituted "shall" for "must" in two places and added the proviso pertaining to administration of estates.

CHAPTER 14—JURORS—SELECTION AND RETURN

93-1401. (8896) Jury lists, by whom and when to be made.

References

State v. Chapman, 139 M 98, 360 P 2d 703.

93-1402. (8897) Selection of persons qualified to serve as trial jurors.

Duplication of Names

Allegation in challenge to the panel that many names were included more than once on the jury list was sufficient to require the court to hear the facts to

determine whether there had been a material variation from the statutory procedure in making up the jury list. *State v. Chapman*, 139 M 98, 360 P 2d 703.

93-1403. (8898) Lists delivered to clerk.**References**

State v. Chapman, 139 M 98, 360 P 2d 703.

93-1404. (8899) Duty of clerk—jury boxes.**Duplication of Names**

An allegation in a challenge to the panel that many names were included more than once on the jury list was sufficient to require the court to hear the facts to

determine whether there had been a material variation from the statutory procedure in making up the jury list. State v. Chapman, 139 M 98, 360 P 2d 703.

CHAPTER 19—COURT REPORTERS

Section 93-1904. To furnish copies to parties, etc.

93-1904. (8931) To furnish copies to parties, etc. Each reporter specified in this chapter must likewise, upon request, furnish, with all reasonable diligence, to the defendant in a criminal cause, or a party or his attorney in a civil cause, in which he has attended the trial or hearing, a copy, written out at length or in narrative form, from his stenographic notes, of the testimony and proceedings, or a part thereof, upon the trial or hearing, upon payment by the person requiring the same, the sum of seven and one-half cents (\$.075) per folio. If the county attorney or attorney-general or judge requires such copy in a criminal cause, the reporter is entitled to his fees therefor; but he must furnish it, and upon furnishing it, he shall receive a certificate of the sum to which he is so entitled, which is a county charge, and must be paid by the county treasurer upon the certificate like other county charges. If the judge requires such a copy in a civil case to assist him in rendering a decision, the reporter must furnish the same without charge therefor. If it appears to the judge that a defendant in a criminal case is unable to pay for such copy, the same shall be furnished him and paid for by the county.

History: En. Sec. 373, C. Civ. Proc. 1895; re-en. Sec. 6376, Rev. C. 1907; re-en. Sec. 8931, R. C. M. 1921; amd. Sec. 4, Ch. 22, L. 1961; amd. Sec. 1, Ch. 163, L. 1963.

folio for the copy written out in narrative form."

Amendment

The 1963 amendment substituted "seven and one-half cents (\$.075) per folio" at the end of the first sentence for "five cents per folio for the copy written out at length, and seven and one-half cents per

Application for Order

Proper showing must be made to the district court that a defendant in a criminal case is unable to pay for a transcript so as to secure an order that it be furnished him and paid for by the county. State v. Davis, 139 M 616, 362 P 2d 1013, 1014.

CHAPTER 20—ATTORNEYS—QUALIFICATIONS—ADMISSION—LICENSE AND DISBARMENT

Section 93-2011. Disposition of attorneys' license tax.

93-2014. Compensation and expenses of members of board.

93-2015. Fees on application for admission to bar.

93-2020. Witnesses on behalf of complainant, fees and mileage of.

93-2005. (8940) Admission of attorneys from other states.**Objection to Appearance**

Defendants, present in court during trial, who made no objection to the appearance of nonresident as their attorney,

were not entitled to an order vacating and setting aside judgment on the ground that nonresident attorney was not licensed

to practice in Montana. Shoal v. Bailey, 139 M 198, 362 P 2d 234, 236.

93-2011. (8946) Disposition of attorneys' license tax. All moneys so collected during any month shall, on or before the first day of the succeeding month, be delivered to and deposited with the state treasurer by the clerk of the supreme court, and the state treasurer shall deposit such moneys in the general fund.

History: En. Sec. 3, Ch. 90, L. 1917; re-en. Sec. 8946, R. C. M. 1921; amd. Sec. 81, Ch. 147, L. 1963.

Amendment

The 1963 amendment substituted "de-

posit such moneys in the general fund" at the end of the section for "place and hold the same in a special fund to be known as 'attorneys' license tax fund,' and shall be paid out and disbursed as hereinafter provided."

93-2014. (8949) Compensation and expenses of members of board. The members of said board shall be entitled to their necessary traveling expenses in attending meetings of said board and in conducting such examination, and also, when away from their homes or places of residence, their necessary lodging and hotel expenses, and shall be paid such compensation, per diem, for services performed by them as members of said board, as may be fixed and determined by the supreme court.

History: En. Sec. 6, Ch. 90, L. 1917; re-en. Sec. 8949, R. C. M. 1921; amd. Sec. 82, Ch. 147, L. 1963.

Amendment

The 1963 amendment deleted a second

sentence reading, "Such expenses and compensation shall be paid out of the attorneys' license tax fund by the state treasurer, upon warrants duly drawn by the state auditor therefor."

93-2015. (8950) Fees on application for admission to bar. Every applicant for admission to the bar, by examination or otherwise, must pay to the clerk of the supreme court, at the time he files his application for examination or his petition for admission, the sum of twenty-five dollars (\$25.00). Should the applicant fail in the examination taken by him, he may take another examination before the said board at any time within one year thereafter without further payment. No other fee shall be exacted for admission of any applicant, if admitted within one year after the payment of the fee of twenty-five dollars (\$25.00) hereinabove designated. All money collected from fees herein provided for shall be deposited with the state treasurer by the clerk of the supreme court, and placed in the general fund.

History: En. Sec. 7, Ch. 90, L. 1917; re-en. Sec. 8950, R. C. M. 1921; amd. Sec. 83, Ch. 147, L. 1963.

Amendment

The 1963 amendment substituted "the

general fund" at the end of the section for "said attorneys' license tax fund, and shall be paid out and disbursed only as herein provided."

93-2020. (8955) Witnesses on behalf of complainant, fees and mileage of. Witnesses on behalf of the complainant in any such action or proceeding shall be entitled to the fees and mileage provided by law for witnesses in civil actions in the district court.

History: En. Sec. 12, Ch. 90, L. 1917; re-en. Sec. 8955, R. C. M. 1921; amd. Sec. 84, Ch. 147, L. 1963.

Amendment

The 1963 amendment deleted a final clause reading, "and such fees and mileage

and other costs necessarily incurred in the prosecution of any such action or proceeding shall be paid by the state treasurer out

of the attorneys' license tax fund, upon warrants duly drawn by the state auditor."

93-2021, 93-2022. (8956, 8957) Repealed.

Repeal

These sections (Sees. 13, 14, Ch. 90, L. 1917), relating to payment of expenses

from the attorneys' license tax fund, were repealed by Sec. 242, Ch. 147, Laws 1963.

93-2025. (8960) Repealed.

Repeal

This section (Sec. 17, Ch. 90, L. 1917; Sec. 1, Ch. 9, L. 1931), relating to the

transfer of unexpended license tax funds, was repealed by Sec. 242, Ch. 147, Laws 1963.

93-2038. (8973) Judgment.

Negligence of Attorney

Attorney was deprived of the right to practice in the courts of Montana for 45 days where he was guilty of deliberate falsehood in telling client that case filed in April 1956 was at issue and was await-

ing trial, the debtor in the action having entered no appearance and default judgment such as was entered on April 11, 1961, could have been entered in June of 1956. In re Hirst, — M —, 368 P 2d 157, 158.

CHAPTER 21—ATTORNEYS—POWERS—DUTIES—LIABILITIES AND COMPENSATION

93-2112. (8985) Former public prosecutors not to defend, etc.

Improper Representation

Where prisoner was represented in a second case by court-appointed counsel who had formerly prosecuted him while serving as county attorney in a case resulting in the prior conviction with which

he was charged in the second case, the error, if any, should have been raised in the district court by a writ of error coram nobis and not by habeas corpus proceeding in the supreme court. Butler v. State, 139 M 437, 365 P 2d 822, 823.

CHAPTER 22—JUDICIAL REMEDIES, ACTIONS AND SPECIAL PROCEEDINGS

93-2203. (8997) Action defined.

Cause of Action

A cause of action is ordinarily considered as involving the combination of two elements, first, a right on the part of the plaintiff, and second the violation or infringement of such right by the defendant. *Duffy v. Lipsman-Fulkerson & Co.*, 200 F Supp 71, 72.

The right to maintain an action de-

pends upon the existence of what is termed a cause of action. *Duffy v. Lipsman-Fulkerson & Co.*, 200 F Supp 71, 72.

Loss of Consortium

A wife can maintain an action for loss of consortium when such loss is the result of negligent injury to her husband. *Duffy v. Lipsman-Fulkerson & Co.*, 200 F Supp 71, 72.

CHAPTER 25—LIMITATION OF ACTIONS FOR RECOVERY OF REAL PROPERTY

93-2504. (9015) Seizin within five years, when necessary, etc.

Easement by Prescription

Plaintiffs, who acquired prescriptive easement in road across property of defendants by use for thirty-five years before defendants acquired title to the land and attempted to obstruct use, were entitled

to enjoin defendants from interfering with use of right of way over road. *Scott v. Weinheimer*, — M —, 374 P 2d 91, 96.

To establish the existence of an easement by prescription, the party so claiming must show open, notorious, exclusive,

adverse, continuous and uninterrupted use of the easement claimed for the full statutory period. *Scott v. Weinheimer*, — M —, 374 P 2d 91, 95.

Title to an easement acquired by prescription is as effective as though evidenced by a deed. *Scott v. Weinheimer*, — M —, 374 P 2d 91, 94.

CHAPTER 26—LIMITATION OF OTHER ACTIONS

93-2607. (9033) Two-year limitation.

Subd. 1

Violation of Antitrust Laws

Federal district court properly dismissed counterclaims charging deliberate course of conduct on the part of a utility aimed at destroying business of one of the defendants, failure of utility to operate its pipelines as a common carrier as required by the Federal Leasing Act and the Natural Gas Act, and seeking damages for violations of antitrust laws, which

were barred by this section. *Wight v. Montana-Dakota Utilities Co.*, 299 F 2d 470, 480.

When Action Accrues

An action to reform and enforce contract of sale of corporate assets on the ground of mutual mistake, commenced in April of 1955, was promptly brought where facts constituting the mistake were discovered in December of 1954. *Favero v. Wynaecht*, — M —, 371 P 2d 858, 866.

CHAPTER 27—TIME OF COMMENCEMENT OF ACTIONS—GENERAL PROVISIONS CONCERNING

93-2706. (9052) Actions concerning personal property, etc.

Operation and Effect

Action by an administrator, appointed on May 3, 1960, for estate of decedent who died August 5, 1946, for an accounting to recover estate property, was barred under this section. *Cocanougher v. Cocanougher*, — M —, 375 P 2d 1014, 1016.

The purpose of this section is to fix a definite point of time from which an applicable statute of limitations commences to run rather than have an applicable

statute of limitations start to run when an administrator is appointed no matter how long a period has elapsed after the death of an intestate. *Cocanougher v. Cocanougher*, — M —, 375 P 2d 1014, 1015.

Under this section, where decedent died on August 5, 1946, letters of administration were deemed to have been issued on or before August 5, 1951. *Cocanougher v. Cocanougher*, — M —, 375 P 2d 1014, 1015.

93-2719. (9065) Repealed.

Repeal

This section (Sec. 558, C. Civ. Proc.), relating to objections on the basis that ac-

tion was not commenced in time, was repealed by Sec. 1, Ch. 7, Laws 1963.

CHAPTER 28—PARTIES TO CIVIL ACTIONS

Section 93-2802. Assignment of thing in action not to prejudice defense.

93-2801. (9067) Action to be in name of party in interest.

Assignee under Security Device

The assignee of ranch tenant's net proceeds from the sale of livestock was not a necessary party to an action on the lease by the tenant against the landlord, where the assignment was not absolute and the instrument was clearly a security device on its face. *Green v. Wolff*, — M —, 372 P 2d 427, 432.

Wrongful Death Action

District court was directed to deny peti-

tion of decedent's divorced wife, guardian ad litem of decedent's and her children, to intervene in action for wrongful death under section 93-2810 commenced by the widow as administratrix and trustee for the decedent's minor children, and to strike from the files the complaint in intervention as an attempted substitution of party plaintiffs in a wrongful death action. *State ex rel. Carroll v. District Court*, 139 M 367, 364 P 2d 739, 742.

93-2802. (9068) Assignment of thing in action not to prejudice defense.

In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before, notice of the assignment; but this section shall apply only to the extent not otherwise provided for in the Uniform Commercial Code. [Effective January 1, 1965.]

History: En. Sec. 5, p. 44, Bannack Stat.; re-en. Sec. 5, p. 136, L. 1867; re-en. Sec. 5, p. 28, Cod. Stat. 1871; re-en. Sec. 5, p. 40, L. 1877; re-en. Sec. 5, 1st Div. Rev. Stat. 1879; re-en. Sec. 5, 1st Div. Comp. Stat. 1887; re-en. Sec. 571, C. Civ. Proc. 1895; re-en. Sec. 6478, Rev. C. 1907; re-en. Sec. 9068, R. C. M. 1921; amd. Sec. 11-157, Ch. 264, L. 1963. Cal. C. Civ. Proc. Sec. 368.

Amendment

The 1963 amendment substituted "shall apply only to the extent not otherwise provided for in the Uniform Commercial Code" at the end of the section for "does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon consideration, before maturity."

93-2805. (9071) Infant, etc., to appear by guardian.**Injury to Minor**

Damages awarded for injury to a minor cover both the child's cause of action, pursuant to this section, and the parents' cause of action, pursuant to section 93-2809. *Chavez v. United States*, 192 F Supp 263, 270.

In the case of an injury to a minor, there arises two causes of action, one in favor of the minor under this section and the other in favor of the parents under section 93-2809. *Chavez v. United States*, 192 F Supp 263, 270.

93-2809. (9075) Parent or guardian may sue for injury, etc.**Allowance of Interest**

Where the amount due a father for the wrongful death of his minor son was not ascertained (or ascertainable) until after the jury had returned its verdict, interest was allowable only from the date the verdict was rendered. *Wyant v. Dunn*, — M —, 368 P 2d 917, 924. (Dissenting opinion, — M —, 368 P 2d 917, 924.)

Amount of Verdict

A verdict of \$15,195 was not excessive in an action by father for wrongful death of his five-year-old son. *Wyant v. Dunn*, — M —, 368 P 2d 917, 921. (Dissenting opinion, — M —, 368 P 2d 917, 924.)

Argument of Counsel

In an action by a father for the wrongful death of his infant son it was not reversible error for the trial court to permit the plaintiff's counsel, over objection, in their argument to the jury, to suggest a mathematical basis for fixing damages for loss of love, affection, and companionship on a per diem basis, where the trial judge instructed the jury that any remark of counsel not sustained by the evidence should be disregarded. *Wyant v. Dunn*, — M —, 368 P 2d 917, 920. (Dissenting opinion, — M —, 368 P 2d 917, 924.)

Injury to Minor

Damages awarded for injury to a minor cover both the child's cause of action, pursuant to section 93-2805, R. C. M. 1947 (repealed by Laws 1961, ch. 13, sec. 84, effective January 1, 1962), and the parents' cause of action, pursuant to this section. *Chavez v. United States*, 192 F Supp 263, 270.

In the case of an injury to a minor, there arises two causes of action, one in favor of the minor under section 93-2805, R. C. M. 1947 (repealed by Laws 1961, ch. 13, sec. 84, effective January 1, 1962), and the other in favor of the parents under this section. *Chavez v. United States*, 192 F Supp 263, 270.

93-2810. (9076) When representative may sue for death, etc.**Allocation of Amount of Recovery**

In the event of a recovery for the wrongful death of the deceased the district court may then take requisite action to allocate the amount of recovery in a proper pro rata share among the surviving

heirs, but it is clearly not for any jury to decide what amount should be awarded to each of the several plaintiffs in such an action. *State ex rel. Carroll v. District Court*, 139 M 367, 364 P 2d 739, 741.

One Action for Wrongful Death

This section specifically provides that there can be but one action for a wrongful death and that such action must be prosecuted and maintained by the personal representative. *State ex rel. Carroll v. District Court*, 139 M 367, 364 P 2d 739, 741.

Substitution of Parties

District court was directed to deny peti-

tion of decedent's divorced wife, guardian ad litem of decedent's and her children, to intervene in wrongful death action, commenced by the widow as administratrix and trustee for the decedent's minor children, and to strike from the files the complaint in intervention as an attempted substitution of party plaintiffs in a wrongful death action. *State ex rel. Carroll v. District Court*, 139 M 367, 364 P 2d 739, 742.

93-2824. (9086) Action—when not to abate by death, marriage or other disability—proceedings in such case.

History: Ap. p. Sec. 16, p. 45, *Bannack Stat.*; re-en. Sec. 16, p. 137, L. 1867; re-en. Sec. 16, p. 29, *Cod. Stat.* 1871; amd. Sec. 22, p. 43, L. 1877; re-en. Sec. 22, 1st Div. *Rev. Stat.* 1879; en. Sec. 1, p. 98, L. 1883; re-en. Sec. 22, 1st Div. *Comp. Stat.* 1887; amd. Sec. 587, *C. Civ. Proc.* 1895; re-en. Sec. 6494, *Rev. C.* 1907; re-en. Sec. 9086, *R. C. M.* 1921; repealed Sec. 84, Ch. 13, L. 1961; re-instated Sec. 2, Ch. 14, L. 1963. *Cal. C. Civ. Proc. Sec.* 385.

Compiler's Note

This section was originally listed as repealed by section 84 of Chapter 13, *Laws* 1961. However, Chapter 14, *Laws* 1963, repealed the repealer and reinstated section 93-2824, retroactive to January 1, 1962. Section 1, Chapter 14, *Laws* 1963, contained the following recital of purpose: "Under the provisions of Chapter 255, *Laws* of 1959, the supreme court of the state of Montana was authorized and empowered to have prepared and submit proposed rules of pleading, practice and procedure in civil cases in the courts of this state to the next succeeding legislative session for their consideration; that under the provisions of such chapter, a Civil Rules commission was appointed by the supreme court to make a study and thereafter to submit proposed rules to the court; that thereafter and in accordance with Chapter 255, *Laws* of 1959, and the order of the supreme court, proposed new rules covering pleading, practice and procedure were submitted to and approved by the supreme court and transmitted to the legislature for its consideration. Such pro-

posed rules were adopted by Chapter 13, *Laws* of 1961, to be effective January 1, 1962. Inadvertently listed in the tables of statutes superseded by the new rules was section 93-2824, *R. C. M.* 1947, which was shown as superseded by Rule 25, *M. R. Civ. P.* Section 93-2824, *R. C. M.* 1947, dealt with substantive law in that it provided for the survivorship of certain causes of action upon death of the party, whereas Rule 25, *M. R. Civ. P.* provides for substitution upon the death of a party to an action in which the claim is not thereby extinguished, being purely a procedural rule and in no way carried into the rules the provisions of substantive law set forth in section 93-2824, *R. C. M.* 1947, and it is necessary that such mistake be corrected retroactive to the date of such inadvertent purported repeal."

Title of Act

An act to correct a mistaken and inadvertent purported repeal of *R. C. M.* 1947, section 93-2824, known as the "General Survival Statute" which was shown as superseded by Rule 25, *M. R. Civ. P.*, adopted as Chapter 13, *Laws* of 1961, effective January 1, 1962; re-enacting said section 93-2824, *R. C. M.* 1947; and making the same retroactive to accomplish the purpose of correcting the mistake contained in Chapter 13, *Laws* of 1961, Section 79, Rule 86, and Section 82, Table B, Section 83, Table C, and Section 84, and amending Tables B and C of *M. R. Civ. P.* by deleting therefrom reference to section 93-2824, *R. C. M.* 1947.

93-2829. (9091) Action by joint-tenant against his cotenant.

Redemption from Tax Sale

Where a mining company neglected to pay its taxes, a cotenant, having a right to operate the mining property and pay all expenses of such operation and account to other cotenants, under section 84-4132,

had sufficient interest in patented mining claims, separately assessed to the mining company, to permit her to redeem the property from a tax sale. *Dudley v. Higgins*, — M —, 375 P 2d 689, 691.

CHAPTER 29—PLACE OF TRIAL OF CIVIL ACTIONS

93-2902. (9094) Other actions—where the cause, etc.**Prohibition**

Proceeding for writ of prohibition to restrain board of equalization from enforcing amendments to regulations relating to corporation license tax allegedly due on patronage dividends of farm co-opera-

tives should have been brought in the first judicial district under this section and section 84-1508. State ex rel. Fulton v. District Court, 139 M 573, 366 P 2d 435, 440.

93-2904. (9096) Other actions, according to the residence of the parties.**Doctrine of Forum Non Conveniens**

In an action commenced under the Federal Employees' Liability Act (U. S. C., tit. 45, sec. 51 et seq.) in the district court of the second judicial district in Silver Bow County, Montana, by plaintiff injured at Spokane, Washington, while working as a switchman, in interstate commerce,

for defendant railroad company incorporated in Minnesota and engaging in business in Washington, defendant was not entitled to dismissal under the doctrine of forum non conveniens because of increased cost of trial in Montana. State ex rel. Great Northern Ry. Co. v. District Court, 139 M 453, 365 P 2d 512, 513.

CHAPTER 30—MANNER OF COMMENCING CIVIL ACTIONS—SERVICE OF SUMMONS

93-3001. (9105) Repealed.**Repeal**

This section (Sec. 66, p. 54, L. 1877), relating to the manner of commencement

of civil actions, was repealed by Sec. 1, Ch. 6, Laws 1963.

93-3004. (9108) Repealed.**Repeal**

This section (Sec. 69, p. 55, L. 1877; Sec. 1, p. 143, L. 1899), relating to the manner

and time of issuing an alias summons, was repealed by Sec. 1, Ch. 5, Laws 1963 and by Sec. 2, Ch. 189, Laws 1963.

93-3008. (9112) Service of summons on certain corporations, etc.**References**

Hamilton v. Lion Head Ski Lift, Inc., 139 M 335, 363 P 2d 716, 717.

93-3009, 93-3010. (9113, 9114) Repealed.**Repeal**

These sections (Secs. 2, 3, Ch. 37, L. 1917; Sec. 2, Ch. 122, L. 1951; Sec. 1, Ch. 151, L. 1953; Sec. 17, Ch. 117, L. 1961),

relating to the service of summons on corporations, were repealed by Sec. 2, Ch. 189, Laws 1963.

93-3019. (9123) Repealed.**Repeal**

This section (Sec. 35, p. 141, L. 1867; Sec. 20, p. 55, L. 1874; Sec. 78, p. 58, L.

1877; Sec. 5, p. 9, L. 1881), relating to attachment of jurisdiction of actions, was repealed by Sec. 2, Ch. 189, Laws 1963.

CHAPTER 34—ANSWER

Section 93-3403. Counterclaim—rules thereof.

93-3403. (9139) Counterclaim—rules thereof. A counterclaim on a contract is subject to the following rules:

1. Except as otherwise provided by the Uniform Commercial Code: If the action is founded upon a contract, which has been assigned by the party thereto, a demand existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.

2. If the plaintiff is a trustee for another, or if the action is in the name of the plaintiff, who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested. [Effective January 1, 1965.]

History: En. Sec. 692, C. Civ. Proc. 1895; re-en. Sec. 6542, Rev. C. 1907; re-en. Sec. 9139, R. C. M. 1921; amd. Sec. 11-158, Ch. 264, L. 1963. Cal. C. Civ. Proc. Sec. 438.

Amendment

The 1963 amendment substituted "A counterclaim on a contract" at the beginning of the section for "But the counterclaim, specified in subdivision 2 of

the last section"; inserted "Except as otherwise provided by the Uniform Commercial Code" at the beginning of paragraph 1; deleted the words "other than a negotiable promissory note or bill of exchange" which followed "assigned by the party thereto" in paragraph 1; deleted former paragraph 2, for text of which see parent volume; and redesignated former paragraph 3 as 2.

CHAPTER 37—VERIFICATION OF PLEADINGS

Section 93-3702. Verification of pleadings.

93-3702. (9163) Verification of pleadings. In any case in which an affidavit of verification is required, except as otherwise specifically provided, such affidavit of verification must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated on information and belief, and that as to those he believes it to be true. Such verification must be made by the party, or, if there are several parties united in interest or pleading, by one at least of such parties acquainted with the facts, if such party is in the county and capable of making the affidavit. The verification may also be made by the agent or attorney of the party, if the party is absent from the county where the attorney resides, or is from any other cause unable to verify the pleading, and in such case the verification must state that the deponent is the agent or attorney of the party, and the reason why such verification is made by such agent or attorney, and that the matters stated in the pleading are true to the best knowledge, information and belief of such agent or attorney. When a corporation is a party, the verification may be made by any officer thereof, and must state what officer he is, and that the matters stated therein are true to the best knowledge, information, and belief of such officer. If there

is no officer of the corporation within the county, the verification may be made by its attorney.

History: Ap. p. Sec. 55, p. 144, L. 1867; amd. Sec. 9, p. 64, L. 1869; amd. Sec. 63, p. 39, Cod. Stat. 1871; re-en. Sec. 94, p. 62, L. 1877; re-en. Sec. 94, 1st Div. Rev. Stat. 1879; re-en. Sec. 96, 1st Div. Comp. Stat. 1887; en. Sec. 731, C. Civ. Proc. 1895; re-en. Sec. 6565, Rev. C. 1907; re-en. Sec. 9163, R. C. M. 1921; amd. Sec. 1, Ch. 15, L. 1963. Cal. C. Civ. Proc. Sec. 446.

Amendment

The 1963 amendment substituted the words "In any case in which an affidavit of verification is required, except as otherwise specifically provided, such" at the beginning of the section for "All complaints,

answers, and replies must be verified as provided in this section, except that when an admission of the truth of the allegation might subject the party to a prosecution for felony or misdemeanor, or when the action or defense is in behalf of the state, county, or a subdivision thereof, or a municipal corporation, the verification may be omitted. The."

Effect of Failure to Verify

It is negligence for an attorney to file a complaint in a district court which is not verified as required by this section. In re Hirst, — M —, 368 P 2d 157, 158.

CHAPTER 43—ATTACHMENT

- Section 93-4301. When attachment may issue.
 93-4302. Affidavit—what to contain.
 93-4307. Levy of attachment.
 93-4338. Attachment of personal property subject to a security interest.
 93-4344. Possession under a mortgage—how acquired.
 93-4346. Duty of county clerk and recorder of marks and brands to record papers.

93-4301. (9256) When attachment may issue. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, as follows:

In an action upon a contract, express or implied, for the direct payment of money, where the contract is not secured by any mortgage or lien upon real property, or, if originally secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless, and in an action based upon a statutory stockholders' liability. [Effective January 1, 1965.]

History: Earlier acts were Sec. 91, p. 60, Bannack Stat.; amd. Sec. 120, p. 156, L. 1867; amd. Sec. 11, p. 64, L. 1869; amd. Sec. 137, p. 54, Cod. Stat. 1871; amd. Sec. 2, p. 40, Ex. L. 1873; re-en. Sec. 179, p. 82, L. 1877; re-en. Sec. 179, 1st Div. Rev. Stat. 1879; re-en. Sec. 181, 1st Div. Comp. Stat. 1887.

En. Sec. 890, C. Civ. Proc. 1895; re-en. Sec. 6656, Rev. C. 1907; re-en. Sec. 9256,

R. C. M. 1921; amd. Sec. 1, Ch. 82, L. 1931; amd. Sec. 11-159, Ch. 264, L. 1963. Cal. C. Civ. Proc. Sec. 537.

Amendment

The 1963 amendment substituted "mortgage or lien upon real property" in the second paragraph for "mortgage or lien upon real or personal property, or any pledge of personal property."

93-4302. (9257) Affidavit—what to contain. The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of the plaintiff, showing:

1. That such defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal counterclaims) upon a contract, express or implied, for the direct payment of money, and that

the payment of the same has not been secured by any mortgage or lien upon real property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; and

2. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant. [Effective January 1, 1965.]

History: Earlier acts were Sec. 91, p. 60, Bannack Stat.; amd. Sec. 120, p. 156, L. 1867; amd. Sec. 11, p. 64, L. 1869; amd. Sec. 137, p. 54, Cod. Stat. 1871; amd. Sec. 2, p. 40, Ex. L. 1873; re-en. Sec. 179, p. 82, L. 1877; re-en. Sec. 179, 1st Div. Rev. Stat. 1879; re-en. Sec. 181, 1st Div. Comp. Stat. 1887.

This section en. Sec. 891, C. Civ. Proc. 1895; re-en. Sec. 6657, Rev. C. 1907; re-en.

Sec. 9257, R. C. M. 1921; amd. Sec. 11-160, Ch. 264, L. 1963. Cal. C. Civ. Proc. Sec. 538.

Amendment

The 1963 amendment substituted "mortgage or lien upon real property" in paragraph 1 for "mortgage or lien upon real or personal property, or any pledge of personal property."

93-4307. (9262) Levy of attachment. The sheriff to whom the writ is directed and delivered must execute the same without delay, and if the undertaking mentioned in section 93-4305 be not given, as follows:

1 to 3. * * * [Same as parent volume.]

4. Investment securities as defined in the Uniform Commercial Code may be attached or levied upon only by seizure by the officer making the attachment or levy; provided, that such a security which has been surrendered to the issuer may be attached or levied upon by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the security of the defendant is attached in pursuance of such writ. Stocks or shares, or interest in stocks or shares, of any corporation or company, other than such investment securities, may be attached either by seizure or by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ. [Effective January 1, 1965.]

5 to 7. * * * [Same as parent volume.]

History: En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R. C. M. 1921; amd. Sec. 1, Ch. 71, L. 1931; amd. Sec.

11-161, Ch. 264, L. 1963. Cal. C. Civ. Proc. Sec. 542.

Amendment

The 1963 amendment inserted a new first sentence in paragraph 4; and substituted "other than such investment securities, may be attached either by seizure or" in the second sentence of paragraph 4 for "must be attached."

93-4338. (9291) Attachment of personal property subject to a security interest. Personal property subject to a security interest may be taken on attachment or execution issued at the suit of a creditor of the debtor under the security agreement; but before the property is so taken, the officer levying the writ must pay or tender to the secured party the amount of the

security agreement debt and interest, or must deposit the same with the county treasurer of the county in which the financing statement covering the security agreement is filed, if such statement is filed with a county clerk and recorder, or if such statement is filed with another filing officer pursuant to law, then with such other filing officer, payable to the order of the secured party; and when the property then taken is sold under process, the officer levying the writ must apply the proceeds of the sale as follows:

1. To the repayment of the sum paid to the secured party, with interest from the date of such payment; and,
2. The balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

The secured party under any security agreement of record shall, upon fifteen days' notice in writing served upon him in person by any creditor of the debtor seeking to satisfy a judgment or demand of such creditor against the debtor, be required to make and file in the office of the county clerk and recorder or other filing officer with whom the financing statement covering the security agreement is filed, an affidavit showing the amount of the indebtedness then actually due and owing to the secured party, and such affidavit shall state the amount of the original obligation for which the security agreement was given as security, and all additional advancements of money or property on the principal obligation since the date of the execution of the security agreement, and all payments of whatsoever kind, whether on principal or interest, made by the debtor to the date of the execution of such affidavit by the secured party, and showing the balance then remaining due and unpaid to the secured party. If within fifteen days from the service of any such demand in writing on the secured party by any creditor of the debtor the secured party shall fail, refuse, or neglect to file the affidavit herein required, the security agreement shall be of no force or effect as against such creditor upon the seizure of any such personal property on attachment or execution. In the event the amount shown to be due is paid to the county treasurer, or to a filing officer as aforesaid, or to the secured party, in satisfaction of the security agreement by any attaching or execution creditor against the debtor, the secured party shall be required to surrender to the county treasurer or such filing officer the security agreement and any note or other evidence of indebtedness secured thereby, which said security agreement or other evidence of indebtedness shall be delivered by the secured party, county treasurer, or filing officer to the attaching or execution creditor. In the event the property is sold under attachment or execution, such attaching creditor shall be required to deliver to the debtor the security agreement and any note or other evidence of indebtedness secured thereby obtained from the secured party when the property is sold for the amount of the indebtedness under the security agreement, or an amount in excess thereof. [Effective January 1, 1965.]

History: En. Sec. 1, Ch. 111, L. 1921;
re-en. Sec. 9291, R. C. M. 1921; amd. Sec.
11-162, Ch. 264, L. 1963.

Amendment

The 1963 amendment substantially re-wrote this section. For previous text, see parent volume.

93-4339. (9292) Repealed.**Repeal**

This section (Sec. 923, C. Civ. Proc. 1895), relating to attachment of mort-

gaged and pledged personal property, was repealed by Sec. 10-102, Ch. 264, Laws 1963, effective January 1, 1965.

93-4344. (9297) Possession under a mortgage—how acquired. In all cases where it is necessary, under the laws of this state, for a party to any mortgage, assignment, bill of sale, or other contract, between the first day of November and the next succeeding fifteenth day of May, to take possession of any such cattle or horses in order to preserve his rights under any such mortgage, assignment, bill of sale, or other contract, it is sufficient for such party to file a copy of the instrument under which he claims, with a notice of such claim appended thereto, with the general recorder of marks and brands within five days after it becomes necessary for him to so take custody and possession of the same. [Effective January 1, 1965.]

History: En. Sec. 2, p. 111, L. 1885; re-en. Sec. 224, 1st Div. Comp. Stat. 1887; re-en. Sec. 941, C. Civ. Proc. 1895; re-en. Sec. 6694, Rev. C. 1907; re-en. Sec. 9297, R. C. M. 1921; amd. Sec. 11-163, Ch. 264, L. 1963.

Amendment

The 1963 amendment substituted "general recorder of marks and brands" near the end of the section for "county clerk of the county wherein such property is running at large."

93-4346. (9299) Duty of county clerk and recorder of marks and brands to record papers. It is the duty of the county clerk and of the general recorder of marks and brands to file all papers deposited with them for that purpose, and required to be filed under the provisions of the three preceding sections, and preserve the same as other records of their offices are preserved, and furnish to persons making inquiry about such files all necessary information concerning the same. [Effective January 1, 1965.]

History: En. Sec. 4, p. 112, L. 1885; re-en. Sec. 226, 1st Div. Comp. Stat. 1887; re-en. Sec. 943, C. Civ. Proc. 1895; re-en. Sec. 6696, Rev. C. 1907; re-en. Sec. 9299, R. C. M. 1921; amd. Sec. 11-164, Ch. 264, L. 1963.

Amendment

The 1963 amendment inserted "and of the general recorder of marks and brands" near the beginning of the section; and made minor changes in phraseology.

CHAPTER 51—TRIAL—CONDUCT OF THE TRIAL**93-5101. (9349) Order of trial.****Argument of Counsel**

In an action by a father for the wrongful death of his infant son it was not reversible error for the trial court to permit the plaintiff's counsel, over objection, in their argument to the jury, to suggest a mathematical basis for fixing damages for loss of love, affection, and

companionship on a per diem basis, where the trial judge instructed the jury that any remark of counsel not sustained by the evidence should be disregarded. *Wyant v. Dunn*, — M —, 368 P 2d 917, 920. (Dissenting opinion, — M —, 368 P 2d 917, 924.)

93-5102. (9350) View by jury of the premises.**Discretion of Trial Court**

Refusal of trial court to permit jury to view premises will not be reviewed by

the supreme court in the absence of a showing of an abuse of discretion. *Puetz v. Carlson*, 139 M 373, 364 P 2d 742, 747.

CHAPTER 52—THE VERDICT—GENERAL AND SPECIAL—DIRECTED WHEN

93-5205. (9364) Directed verdict—when.**Motion for Directed Verdict**

When a case presents only a question of law a directed verdict is proper. *Hurly v.*

Star Transfer Co., — M —, 376 P 2d 504, 507.

CHAPTER 53—TRIAL BY THE COURT

93-5306. (9370) Exception for defective findings, etc.**When Not Applicable**

This rule does not apply where defendants attack the findings for what they

declare, not for the absence of findings or because of omission in the findings. *Enott v. Hinkle, — M —, 369 P 2d 413, 414.*

CHAPTER 55—EXCEPTIONS—SETTLEMENT AND ALLOWANCE OF BILL

93-5505. (9390) Exceptions not presented at time of ruling, etc.**Extending Time for Preparation of Bill—Rule of District Court**

A district court may not condition the extension of time authorized by this section by requiring an order for a transcript from the court reporter and a deposit of his estimated cost. *State ex rel. Ryan v. District Court, — M —, 368 P 2d 802, 804.*

mitment by virtue of the provisions of section 10-630 has the right to have the evidence presented in the district court settled in a bill of exceptions and brought before the supreme court for a review. *In re Gonzalez, 139 M 592, 366 P 2d 718, 720.*

References

State ex rel. White v. District Court, 139 M 613, 359 P 2d 133.

Juvenile Appeal

A juvenile who appeals from a com-

CHAPTER 56—NEW TRIALS—GROUNDS AND MOTIONS FOR—RECORD ON APPEAL FROM FINAL JUDGMENT

93-5603. (9397) When a new trial may be granted.**Subd. 1**Irregularity in the Proceedings

When a party to a lawsuit threatens a witness, there has been an irregularity in the proceedings of the court which prevents a fair trial. *Herren v. Hawks, 139 M 440, 365 P 2d 641, 644.*

ings of the court. *Herren v. Hawks, 139 M 440, 365 P 2d 641, 645.*

Subd. 4Misconduct of DefendantWaiver of Irregularity in the Proceedings

If plaintiff is unable to expose the misconduct of the defendant because of a reasonably based fear for the safety of a witness, then failure to do so is not a waiver of the irregularity in the proceed-

In an action for injuries from a dog bite the district court did not abuse its discretion in granting a new trial because of threats of defendant to plaintiff's witness just prior to trial where the affidavit of the plaintiff alleged that misconduct of defendant could not be exposed at the trial because of a reasonably based fear for the safety of the witness. *Herren v. Hawks, 139 M 440, 365 P 2d 641, 645.*

CHAPTER 58—THE EXECUTION

Section 93-5811. Execution against one of a partnership.

93-5811. (9425) Execution against one of a partnership. If execution is levied upon the interest of one or more parties in the goods and property of a partnership, the same proceedings shall be had as in attachments, provided in sections 93-4336 and 93-4337. [Effective January 1, 1965.]

History: En. Sec. 1219, C. Civ. Proc. 1895; re-en. Sec. 6822, Rev. C. 1907; re-en. Sec. 9425, R. C. M. 1921; amd. Sec. 11-165, Ch. 264, L. 1963.

Amendment

The 1963 amendment deleted a second sentence reading, "Personal property mortgaged or pledged may be taken on execution as provided in section 52-309."

93-5825. (9433) Selling without notice—penalty.

References

Husky Hi Power, Inc. v. Schmidt, — M —, 372 P 2d 142, 144.

93-5826. (9434) Sales—how conducted.

Sheriff's Return

A statement in the sheriff's return that he sold the land in separate parcels, as required by this section, may be overcome

only by clear, unequivocal, and convincing evidence. Husky Hi Power, Inc. v. Schmidt, — M —, 372 P 2d 142, 144.

CHAPTER 59—PROCEEDINGS SUPPLEMENTARY TO EXECUTION

93-5901. (9454) Debtor required to answer concerning his property.

Attendance Outside County

A debtor may not be required to attend court outside the county of his residence

in a proceeding initiated under this section. Belote v. Bakken, 139 M 43, 359 P 2d 372.

93-5902. (9455) Proceedings to compel debtor to appear, etc.

Property To Be Specified

A creditor's affidavit on information and belief that the debtor had property that could be applied to the judgment, but not specifying any such property, was

insufficient to initiate a proceeding under this section; such affidavit, if sufficient at all, initiates a proceeding under section 93-5901. Belote v. Bakken, 139 M 43, 359 P 2d 372.

93-5906. (9459) Judge may order property to be applied on execution.

Judgment against Associates

In supplemental proceedings in aid of execution, district court had no authority to render judgment ordering plaintiff to recover against all doctors, copartners, doing business as a medical clinic, a co-partnership, so that judgment against one

doctor became a judgment against his three associates, where his associates were not served with process, were not present, were not parties to the proceedings, and were not represented. Hoopes v. District Court, — M —, 375 P 2d 691, 695.

93-5907. (9460) Proceedings upon claim of another party to property, etc.

References

Cited in Hoopes v. District Court, — M —, 375 P 2d 691, 694.

CHAPTER 60—FORECLOSURE OF MORTGAGES—ACTIONS FOR—SALES UNDER POWERS

- Section 93-6001. Proceedings in foreclosure suits.
 93-6004. Power of sale.
 93-6005. Sale of real estate under power in mortgage—posting notices.
 93-6006. Rights of redemption applicable.
 93-6007. Allowance of attorneys' fees—petition and notice.
 93-6010. Instruments—negotiability and remedies.

93-6001. (9467) Proceedings in foreclosure suits. There is but one action for the recovery of debt, or the enforcement of any right secured by

mortgage upon real estate, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the encumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale, and the payment of the costs of the court and the expenses of the sale, and the amount due the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien upon the real estate of such judgment debtor, as in other cases on which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action. [Effective January 1, 1965.]

History: Ap. p. Sec. 223, p. 90, Bannack Stat.; en. Sec. 246, p. 185, L. 1867; re-en. Sec. 295, p. 92, Cod. Stat. 1871; re-en. Sec. 346, p. 135, L. 1877; re-en. Sec. 346, 1st Div. Rev. Stat. 1879; re-en. Sec. 358, 1st Div. Comp. Stat. 1887; amd. Sec. 1290, C. Civ. Proc. 1895; re-en. Sec. 6861, Rev. C. 1907; re-en. Sec. 9467, R. C. M. 1921; amd.

Sec. 11-166, Ch. 264, L. 1963. Cal. C. Civ. Proc. Sec. 726.

Amendment

The 1963 amendment deleted "or personal property" following "real estate" in the first sentence.

93-6004. (9470) Power of sale. When a real estate mortgage confers a power of sale, either upon the mortgagee or any other person, to be executed after a breach of the obligation for which the mortgage is a security, either an action may be maintained under this chapter to foreclose, or proceedings may be had under the provisions of the mortgage. [Effective January 1, 1965.]

History: En. Sec. 1293, C. Civ. Proc. 1895; re-en. Sec. 6864, Rev. C. 1907; re-en. Sec. 9470, R. C. M. 1921; amd. Sec. 11-167, Ch. 264, L. 1963.

Amendment

The 1963 amendment inserted "real estate" before "mortgage" near the beginning of the section.

93-6005. (9471) Sale of real estate under power in mortgage—posting notices. Hereafter real estate sold under a power of sale given and contained in a mortgage of real estate, except in a trust indenture as defined in the "Small Tract Financing Act of Montana," shall be advertised for sale at least thirty days before the date fixed for such sale, in a newspaper in the county in which such real estate is situated, and in case there is no newspaper printed and published in said county, then by posting notices in at least five conspicuous places in said county, one of which notices must be posted on the land so advertised for sale. Two other of said notices must be posted in conspicuous places in the township in which said land is situated, one in such conspicuous place in said county as will be most likely to give notice to all persons interested in said sale, and one of said notices must be posted in a conspicuous place at the front door of the county courthouse of the county in which said land is located, and in addition to the said publication or posting, as hereinbefore provided, notices of such

sale must be served personally at least thirty days before the date fixed for such sale upon the occupant of the property so advertised for sale, and upon the mortgagor if within the state of Montana, and upon every person or persons having or claiming an interest of record in the said real estate so advertised for sale who may be found within the said state of Montana.

History: En. Sec. 1, Ch. 165, L. 1917; re-en. Sec. 9471, R. C. M. 1921; amd. Sec. 18, Ch. 177, L. 1963.

Amendment

The 1963 amendment inserted "except in a trust indenture as defined in the 'Small Tract Financing Act of Montana'" after "mortgage of real estate" in the first sentence.

93-6006. (9472) Rights of redemption applicable. All of the rights, powers, and privileges, concerning the redemption from sales of real estate applicable to the sales of real estate under foreclosure proceedings or sales under execution, shall be granted and allowed to sales of real estate under and by virtue of the power of sale contained in any mortgage or deed of trust in this state except to sales of real estate under and by virtue of the power of sale conferred upon a trustee under a trust indenture as defined in the "Small Tract Financing Act of Montana."

History: En. Sec. 2, Ch. 165, L. 1917; re-en. Sec. 9472, R. C. M. 1921; amd. Sec. 19, Ch. 177, L. 1963.

Amendment

The 1963 amendment added the final clause of the section, beginning with "except to sales of real estate."

93-6007. (9473) Allowance of attorneys' fees—petition and notice. If the mortgagee shall demand attorneys' fees in case of the sale of real estate under and by virtue of the power of sale contained in any mortgage or deed of trust in this state, except in case of the sale of real estate by virtue of a power of sale conferred upon a trustee under a trust indenture as defined in the "Small Tract Financing Act of Montana," he shall petition the district court of the county in which said real estate, or any part thereof, may be situated to fix the amount of such attorneys' fee, and a copy of such petition shall be served upon all parties having or claiming an interest of record in the property to be sold, or such of them as may be found within the state, which said copy of said petition must be served at least ten days before the day fixed for hearing, and notice of the time and place of such hearing shall be served at the same time as the copy of said petition is served; such petition shall be acted upon by the said district court before the notice of sale by publication or posting, as hereinbefore provided for, shall be given.

History: En. Sec. 3, Ch. 165, L. 1917; re-en. Sec. 9473, R. C. M. 1921; amd. Sec. 20, Ch. 177, L. 1963.

Amendment

The 1963 amendment inserted the words

"except in case of the sale of real estate by virtue of a power of sale conferred upon a trustee under a trust indenture as defined in the 'Small Tract Financing Act of Montana'" in the first part of the section.

93-6010. Instruments—negotiability and remedies. Nothing in this chapter shall be deemed to affect the negotiability of an instrument, and nothing in this chapter shall be deemed to limit remedies otherwise avail-

able to the purchaser of a promissory note secured by a mortgage unless such purchaser at the time of purchase had notice that the note was so secured. [Effective January 1, 1965.]

History: En. 93-6010 by Sec. 11-168, Ch. 264, L. 1963.

CHAPTER 62—QUIETING TITLE TO PROPERTY, REAL AND PERSONAL AND OTHER ACTIONS CONCERNING REAL ESTATE

93-6204. (9480) Parties defendant—unknown claimants.

Quiet Title Action

In an action to quiet title to a house and lot, which included unknown claimants as defendants, where the scrivener of the deed erred in misnaming the corporate grantee, it was error to strike demurrer of corporate defendant alleging that the

complaint failed to state a cause of action against the defendant and defendant was not required to intervene. *Williams v. Widows and Orphans Home, Veterans of Foreign Wars, of Eaton Rapids, Mich.*, — M —, 373 P 2d 948, 950.

93-6206 to 93-6208. (9482, 9483, 9485) Repealed.

Repeal

These sections (Sec. 2, Ch. 113, L. 1915; Sec. 1, Ch. 55, L. 1923; Secs. 2, 3, Ch. 70, L. 1931; Sec. 1, Ch. 15, L. 1947; Sec. 1,

Ch. 66, L. 1949; Sec. 1, Ch. 103, L. 1953; Sec. 1, Ch. 229, L. 1953), relating to service of summons by publication, were repealed by Sec. 2, Ch. 189, Laws 1963.

CHAPTER 64—QUO WARRANTO

93-6401. (9576) When proceedings may be instituted.

Right to Hold Office of Clerk of School District

In an action to test the right of defendant to occupy office of clerk of school district board of trustees, wherein plaintiff contended that as clerk of school district board of trustees, she was a public officer and could only be removed on

notice and hearing, application for leave to file a complaint in quo warranto was properly denied by the district court, plaintiff being only an employee and the rule for removal of public officers being inapplicable. *State ex rel. Running v. Jacobson*, — M —, 370 P 2d 483, 486.

CHAPTER 80—SUPREME COURT—APPEALS

93-8003. (9731) From what judgment or order an appeal may be taken.

Subd. 1—Final Judgments

Dismissal of Action

An appeal to the supreme court may be taken from a judgment dismissing an action which is based on an order sustaining a demurrer to the complaint. *Monarch Lumber Co. v. Haggard*, 139 M 105, 360 P 2d 794.

A judgment of dismissal entered following the sustaining of a demurrer, when the appellant has elected to stand upon his pleading, is appealable under this sec-

tion. *Cahill-Mooney Constr. Co. v. Ayres*, — M —, 373 P 2d 703, 704.

Order Sustaining Demurrer to Petition for Revocation of Probate of Will

An order sustaining a demurrer to petition for revocation of the probate of a subsequent will is an appealable order under this section as amended by Chapter 41, Session Laws 1941. *In re Maricich's Estate*, — M —, 371 P 2d 354, 355.

93-8005. (9733) Appeal—how taken.

Service of Notice

Service of transcript on appeal containing notice of appeal did not constitute service of notice of appeal under this section. *State v. Alexander*, — M —, 372 P 2d 426, 427.

Motion to dismiss appeal must be granted by the supreme court where failure to serve the notice of appeal as required by this section deprives the supreme court of jurisdiction. *State v. Alexander*, — M —, 372 P 2d 426, 427.

93-8017. (9745) Record on appeal from orders other than new trial.**References**

Puetz v. Carlson, 139 M 373, 364 P 2d 742, 743.

CHAPTER 85—NOTICES AND FILING AND SERVICE OF PAPERS

Section 93-8505. Appearance—notice after appearance.

93-8505. (9782) Appearance—notice after appearance. A defendant appears in an action when he answers, files a motion, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him, or has such appearance entered in open court. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given.

History: En. Sec. 494, p. 232, L. 1867; re-en. Sec. 574, p. 152, Cod. Stat. 1871; re-en. Sec. 478, p. 167, L. 1877; re-en. Sec. 478, 1st Div. Rev. Stat. 1879; re-en. Sec. 491, 1st Div. Comp. Stat. 1887; amd. Sec. 1834, C. Civ. Proc. 1895; re-en. Sec. 7149, Rev. C. 1907; re-en. Sec. 9782, R. C. M. 1921; amd. Sec. 1, Ch. 4, L. 1963. Cal. C. Civ. Proc. Sec. 1014.

Amendment

The 1963 amendment substituted "files a motion" for "demurs" in the first sentence, and deleted a third sentence which read, "But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail."

CHAPTER 86—COSTS AND DISBURSEMENTS—COST BILL—SUIT IN FORMA PAUPERIS

Section 93-8613. Counsel fees on foreclosure.

93-8606. (9791) Costs of appeal discretionary with the court, etc.**Printing of Briefs**

The going rate charged by the only printing establishments in Great Falls, Montana, for printing briefs, even though more than double other available printing

prices within the state, is not unreasonable. *A. T. Klemens & Son v. Reber Plumbing & Heating Co.*, 139 M 433, 365 P 2d 525, 526.

93-8613. (9798) Counsel fees on foreclosure. In an action to foreclose a mortgage of real property, or a security interest in personal property, the court must allow as a part of the costs a reasonable attorney's fee, which shall be fixed by the court, any stipulation in the instrument or any agreement between the parties to the contrary notwithstanding. [Effective January 1, 1965.]

History: En. Sec. 1862, C. Civ. Proc. 1895; re-en. Sec. 7165, Rev. C. 1907; re-en. Sec. 9798, R. C. M. 1921; amd. Sec. 11-169, Ch. 264, L. 1963.

Amendment

The 1963 amendment substituted "mortgage of real property, or a security interest in personal property" for "mortgage or pledge"; and substituted "instrument" for

"mortgage" in the latter part of the section.

Priority

The cost of extending abstract and attorney fees borne by mortgagee seeking foreclosure took priority over federal tax liens, which attached after the mortgage was in default. *Streeter Bros. v. Overfelt*, 202 F Supp 143, 146.

93-8618. (9802) What are costs and disbursements.**Depositions for Defendant's Benefit**

Discovery depositions or depositions for defendant's benefit cannot be charged to

plaintiff. *Davis v. Trobough*, 139 M 322, 363 P 2d 727, 729.

Printing of Briefs

The going rate charged by the only printing establishments in Great Falls, Montana, for printing briefs, even though more than double other available printing prices within the state, is not unreasonable. *A. T. Klemens & Son v. Reber Plumbing & Heating Co.*, 139 M 433, 365 P 2d 525, 526.

What are Allowable Costs

Persons named as defendants, but who were not served with process and did not enter an appearance, were not parties to the action, so were entitled to per diem

and mileage for attendance as witnesses. *Nelson v. Montana Iron Mining Co.*, — M —, 371 P 2d 874, 878.

The list of items under this section is exclusive in respect to allowable costs except as to cases taken out of its operation by special statute, by stipulation of the parties, or by rule of court. *Roseneau Foods, Inc. v. Coleman*, — M —, 374 P 2d 87, 91.

In an action by a landlord for unlawful detainer attorney's fees are not recoverable as damages or costs. *Roseneau Foods, Inc. v. Coleman*, — M —, 374 P 2d 87, 91.

93-8619. (1903) Bill of costs.**Computation of Five-day Period**

The five-day period, prescribed by this section, is computed from the day the court enters judgment, not from the day the court orally announces its decision. *Davis v. Trobough*, 139 M 322, 363 P 2d 727, 729.

Where judgment of nonsuit was entered by defendant on May 31, 1960, memorandum of costs, served by mail pursuant to

section 93-8504, R. C. M. 1947 (repealed by Laws 1961, ch. 13, sec. 84, effective January 1, 1962), postmarked June 5, 1960 met the requirements of this section since June 5th was the fifth day. In the computation of the time the first day is excluded as prescribed by section 90-407. *Davis v. Trobough*, 139 M 322, 363 P 2d 727, 730.

93-8622. (1906) Interest and costs included in judgment.**Wrongful Death**

Where the amount due a father for the wrongful death of his minor son was not ascertained (or ascertainable) until after the jury had returned its verdict, interest

was allowable only from the date the verdict was rendered. *Wyant v. Dunn*, — M —, 368 P 2d 917, 924. (Dissenting opinion, — M —, 368 P 2d 917, 924.)

CHAPTER 87—GENERAL PROVISIONS

93-8704. (1919) Successive actions on the same contract, etc.**Ranch Lease**

Tenants, after bringing action against landlords for breach of contract at end of 1957-1958 season, could treat each year of the ranch lease contract as a divisible part of the contract, where it contained

several divisible parts and ran for four successive years; each year of the farm operation and each year of the livestock operation was a separate phase to be separately performed and settled. *Green v. Wolff*, —M —, 372 P 2d 427, 434.

CHAPTER 89—UNIFORM DECLARATORY JUDGMENTS ACT

93-8901. (1935.1) Scope.**Application**

The Uniform Declaratory Judgments Act (93-8901 to 93-8916) does not apply to criminal cases. *Goff v. State*, — M —, 374 P 2d 862.

Denial of Writ of Prohibition

District court should have denied application for writ of prohibition to re-

strain board of equalization from enforcing amendments to regulations relating to corporation license tax allegedly due on patronage dividends of farm co-operatives where action for declaratory judgment could have been brought under sections 93-8901 to 93-8916. *State ex rel. Fulton v. District Court*, 139 M 573, 366 P 2d 435, 437.

93-8902. (1935.2) Power to construe, etc.**Persons Entitled to Bring Action**

Where a controversy existed between a

rural electric co-operative and an electric power company as to the right of the co-

operative to supply service to an addition to a city, the co-operative could have brought an action to determine its legal position before proceeding to install fa-

cilities to service the addition. *Montana Power Co. v. Park Electric Co-operative*, — M —, 371 P 2d 1, 6.

93-8911. (19835.5) Parties.

Intimate Connection of Parties

In an action under the Declaratory Judgments Act (93-8901 to 93-8916) by insured against insurer, which had issued a policy covering commercial hauling of trailer homes, the insurer's general agent, and local insurance agent, district court did not err in overruling insurer's demurrer on grounds of misjoinder of causes of action and parties defendant, contending that action against local agent being one for tort and action against the insurer and general agent being based on a contract

could not be combined, which defect could not be cured by a declaratory judgment, since the rights of all of the parties were intimately connected by the one transaction and the presence of all of the parties was necessary to a determination of their rights. The liability of the insurer depended upon the existence of an amendment to the contract and the liability of the local agent depended upon an absence of that same amendment. *Adams & Greig, Inc. v. National Indemnity Co.*, — M —, 375 P 2d 112, 115.

CHAPTER 90—CERTIORARI (WRIT OF REVIEW)

93-9002. (19837) When and by what courts granted.

Not Available Where Error may be Reached by Appeal

A writ of certiorari is not available in Montana to review question of alleged violations of federal constitutional rights

of petitioner concerning voluntariness of guilty plea, where he had not moved to withdraw the plea. *Brown v. State of Montana*, 202 F Supp 29, 30.

CHAPTER 91—MANDAMUS (WRIT OF MANDATE)

93-9103. (19849) Writ—when and upon what to issue.

Cancellation of Tax Deeds

Writ of mandamus to require county treasurer to cancel tax deeds upon certain real property to which petitioners asserted ownership was denied it being apparent that the county treasurer had no clear legal duty to cancel the tax deeds since the petitioners were involved in a quiet title action, to which county and tax debtors were parties, in the district court touching the gist of their petition for a writ of mandamus. *Sullivan v. Treasurer of Silver Bow County*, — M —, 370 P 2d 762.

Claim against County

District court properly quashed writ of mandate to compel county commissioners to allow claim of hospital since there existed a plain, speedy and adequate remedy at law under section 16-1801 [16-1808], which provides for an appeal to the district court from a disallowed claim. *State ex rel. Montana Hospital Assn. v. Pitch*, — M —, 372 P 2d 90, 91.

Denial of Writ

Mandamus is an extraordinary remedy and will not issue if there is a plain, speedy and adequate remedy at law. *Moran v. Board of County Commrs.*, 139 M 351, 363 P 2d 1073, 1074.

Judgment of district court quashing writ of mandate was well founded where property owner, who brought action in mandamus to compel county commissioners to refund sum paid to redeem land on ground that taxes had been erroneously collected, had adequate remedy at law to recover taxes under section 84-4176. *Moran v. Board of County Commrs.*, 139 M 351, 363 P 2d 1073, 1074.

When Mandamus Lies

The writ of mandamus is issued where there is not a plain, speedy and adequate remedy in the ordinary course of law. *Sullivan v. Treasurer of Silver Bow County*, — M —, 370 P 2d 762.

A person seeking a writ of mandamus must be entitled to have the defendant perform a clear legal duty. *Sullivan v. Treasurer of Silver Bow County*, — M —, 370 P 2d 762.

93-9111. (9857) If no answer be made, etc.**References**

Cited in *State v. Bare*, — M —, 377 P 2d 357, 360.

CHAPTER 92—PROHIBITION—WRIT OF

93-9201. (9861) Prohibition defined.**Jurisdiction**

District court had no jurisdiction to issue an alternative writ of prohibition to restrain board of equalization from enforcing amendments to regulations relating to corporation license tax allegedly due on patronage dividends of farm co-operatives, until after hearing before said

court, where tax could be paid under protest and action brought to recover as provided in section 84-4501 or an action for declaratory judgment could be brought under sections 93-8901 to 93-8916. *State ex rel. Fulton v. District Court*, 139 M 573, 366 P 2d 435, 437.

CHAPTER 97—FORCIBLE ENTRY AND UNLAWFUL DETAINER—ACTIONS FOR

93-9703. (9889) Unlawful detainer defined.**Notice to Quit**

Subdivision 2 of this section, which provides that in the case of agricultural lands there must be a "demand of possession or notice to quit" if the tenant "retained possession for more than sixty days after the expiration of his term" does not apply where there is a failure to establish the term of an oral farm lease. *Enott v. Hinkle*, — M —, 369 P 2d 413, 415.

An action in unlawful detainer cannot be maintained under this section if the tenant is lawfully in possession under a tenancy from year to year as provided by

section 42-203 without first giving notice thirty days prior to the anniversary date of the tenancy as prescribed in section 42-206. *Roseneau Foods, Inc. v. Coleman*, — M —, 374 P 2d 87, 91.

Stay of Action

A stay should have been granted in unlawful detainer action by landlord pending determination of tenant's action against landlord for specific performance of alleged option to re-lease premises. *Stanisich v. State Highway Commission*, — M —, 375 P 2d 1019, 1021.

CHAPTER 99—EMINENT DOMAIN

93-9904. (9936) Private property defined—classes enumerated.**References**

Cove Irrigation Co. v. Yellowstone Ditch Co., 139 M 281, 362 P 2d 543, 544.

93-9905. (9937) Facts necessary to be found before condemnation.**Condemnation of Covenants in a Deed**

In condemnation proceedings instituted by a mutual irrigation company, insolvency of plaintiff, which had acquired canal of defendant mutual irrigation company by contract containing covenants, as consideration for conveyance, under which it

obligated itself to furnish defendant company and its users with the same amount of water they had been receiving, was not a "good cause" or "necessity" for condemnation of such covenants by plaintiff. *Cove Irrigation Co. v. Yellowstone Ditch Co.*, 139 M 281, 362 P 2d 543, 545.

93-9912. (9944) Appointment and meeting of commissioners.**Supervision by Presiding Judge**

Although this section as amended in 1961 gives the presiding judge supervision over the commissioners, it does not grant

to the court the right to amend or alter their award. *State ex rel. Frelich v. District Court*, — M —, 375 P 2d 1016, 1018.

DECISIONS UNDER FORMER LAW

Submission of Verdict to Jury

The district court did not err in submitting verdicts to the jury by which damages were fixed in one sum and without separately stating the amount of damage for the taking and the damage to the remainder where all other witnesses testified as to one figure only, and gave their basis for it; state's counsel, on cross-examination, did not attempt nor could he, segregate the two items, they being interwoven in the very nature of the methods of appraisal; and it would not have been practical, even if possible, to have asked the jury to separately fix the figures be-

cause of the manner in which the testimony was produced by both sides. *State v. Heltborg*, — M —, 369 P 2d 521, 525.

Valuation of Property

Income could be used as a basis for arriving at market value in condemnation case where testimony of the various witnesses for both the landowners and the state, who explained their method of valuation, used the same general approach in determining the loss in value, which approach was labeled the "capitalization of income" approach. *State v. Heltborg*, — M —, 369 P 2d 521, 523.

93-9913. (9945) The date with respect to which compensation, etc.**Cross-Reference**

Compensation not to be paid for improvements after recording of highway plan by state highway commission, sec. 32-1615.3.

Market Value

Income could be used as a basis for arriving at market value in condemnation

case where testimony of the various witnesses for both the landowners and the state, who explained their method of valuation, used the same general approach in determining the loss in value, which approach was labeled the "capitalization of income" approach. *State v. Heltborg*, — M —, 369 P 2d 521, 523.

93-9914. (9946) Report of commissioners.**Alteration of Award**

A district court cannot alter or amend a commissioners' award after it has been filed with the district court and notice

thereof given to the parties by the clerk. *State ex rel. Frelich v. District Court*, — M —, 375 P 2d 1016, 1018.

93-9915. (9947) Appeal from assessment of commissioners.**Alteration of Award**

Improper order of district court in striking certain damages from commissioners' award could not be corrected where an appeal had been taken from the award. *State ex rel. Frelich v. District Court*, — M —, 375 P 2d 1016, 1018.

of the commissioners appointed to appraise damages, it was reversible error for the state to try to impeach the witness by using the commission award in order to get the whole commission award before the jury. *State v. Bare*, — M —, 377 P 2d 357, 359.

Expert Testimony

On appeal by state from condemnation award in proceeding to acquire land for interstate highway right of way where it was made clear on direct examination that expert witness for landowner had been one

Right to Receive Damages

The state cannot appeal from decision of commissioners contesting right of county to receive damages when it did not raise the issue in the pleading stage. *State v. Park County*, — M —, 376 P 2d 998.

93-9921. (9953) Costs, allowance and apportionment of.**Expert Witness Fees**

This section applies to costs recognized and allowed by statute but it does not

add expert witness fees other than as an ordinary witness. *State v. Heltborg*, — M —, 369 P 2d 521, 525.

CHAPTER 201—ARBITRATION—SUBMISSION TO

93-201-1. (9972) What may be submitted to arbitration, and when.**Voluntary Submission of Disputes**

This section contemplates voluntary submission of disputes in existence at the

time of the submission. *Green v. Wolff*, — M —, 372 P 2d 427, 433.

CHAPTER 401—EVIDENCE—GENERAL PRINCIPLES OF

Section 93-401-22. Writings—how construed.

93-401-1. (10505) One witness sufficient to prove a fact.

References

Dorall v. Davis, 139 M 69, 360 P 2d 409.

93-401-6. (10510) Declarations of predecessor in title evidence.

Water Rights

Defendants failed to establish a prescriptive water right regardless of priority of rights, where depositions which were self-serving declarations were not admis-

sible as ancient documents or public records as exceptions to hearsay rule and no other satisfactory proof of possession or use of the water was shown. *King v. Schultz*, — M —, 375 P 2d 108, 110.

93-401-13. (10517) An agreement reduced to writing deemed the whole.

Mistake and Imperfection of Writing

In action by sellers of hotel business, including personal property, against buyers for balance due on contract, answer setting up affirmative defenses, which pleaded representations and warranties of seller concerning the leasing of the premises

which the buyers relied on, was sufficiently clear to comply with this section as against motion to strike on the ground that the allegations tended to vary the terms of a written contract. *Swecker v. Badura*, — M —, 377 P 2d 752, 754.

93-401-17. (10521) The circumstances to be considered.

References

Peerless Casualty Co. v. Mountain States Mut. Casualty Co., 283 F 2d 268, 278.

93-401-18. (10522) Terms to be construed in their general acceptance.

Reinsurance Contract

Where amended agreement between automobile insurer and reinsurer was the same as that contained in prior agreement, which the parties had interpreted as contended for by the insurer, findings that agreement was ambiguous, and that the

parties did not intend to give the words in the amendment a different meaning than that given in the agreement, being supported by substantial evidence, warranted judgment in favor of insurer. *Peerless Casualty Co. v. Mountain State Mut. Casualty Co.*, 283 F 2d 268, 276.

93-401-22. (10526) Writings—how construed. A written notice, as well as every other writing, is to be construed according to the ordinary acceptance of its terms. Thus, a notice to the drawers or endorsers of a draft or promissory note, that it has been protested for want of acceptance or payment must be held to import that any necessary presentment for acceptance or payment has been made, that the instrument has been dishonored, and that the holder looks for payment to the person to whom the notice is given. [Effective January 1, 1965.]

History: En. Sec. 619, p. 200, L. 1877; re-en. Sec. 619, 1st Div. Rev. Stat. 1879; re-en. Sec. 637, 1st Div. Comp. Stat. 1887; re-en. Sec. 3141, C. Civ. Proc. 1895; re-en. Sec. 7882, Rev. C. 1907; re-en. Sec. 10526, R. C. M. 1921; amd. Sec. 11-170, Ch. 264, L. 1963. Cal. C. Civ. Proc. Sec. 1865.

Amendment

The 1963 amendment substituted "draft"

for "bill of exchange" in the early part of the second sentence; substituted "any necessary presentment for acceptance or payment has been made, that the instrument has been dishonored" in the second sentence for "the same has been duly presented for acceptance or payment, and the same refused"; and made a minor change in punctuation.

CHAPTER 501—EVIDENCE—JUDICIAL NOTICE OF FACTS
AND FOREIGN LAWS

93-501-2. Judicial notice of laws of other states.

Foreign Law

Once the court has been invited to take judicial notice of particular foreign law, then the court must make an independent

determination as to which is the correct foreign law. *H. & J. Gross, Inc. v. Fraser*, — M —, 368 P 2d 163, 165.

93-501-5. Notice to adverse party, when required.

Foreign Law

Where defendant invited the court to take judicial notice of certain Pennsylvania statutes to support his argument that a writ of summons must be served to gain jurisdiction over him, he could not complain that lack of notice prevented

the introduction of other parts of that foreign law. Once the door was opened by the defendant there was no longer a question of notice. At that point it became the duty of the court to find the correct foreign law. *H. & J. Gross, Inc. v. Fraser*, — M —, 368 P 2d 163, 165.

CHAPTER 701—EVIDENCE—WITNESSES

93-701-3. (10535) Persons who cannot be witnesses.

Subd. 3

Purpose

The purpose of this subdivision is to prevent the living party by reason of the death of the adversary, gaining an undue advantage over the administrator, and to remove the temptation for the commission of perjury by a party in the instances noted being permitted to testify to a communication or transaction as to which in all probability there can be no denial by a living person. *Novak v. Novak*, — M —, 377 P 2d 367, 369.

Wife of Claimant

In an action by a son for care of his deceased father, where another witness had testified as to conversation with deceased, it was proper to permit wife of plaintiff to testify as to conversation between her husband and the deceased as she had no direct legal or pecuniary interest in the event. Not being a party to the action she had no direct right growing out of the marital relationship which would attach to the money recovered. *Novak v. Novak*, — M —, 377 P 2d 367, 369.

CHAPTER 1001—EVIDENCE—PUBLIC WRITINGS

93-1001-23. (10561) What deemed adjudged in a judgment.

Title to Corporate Stock

Denial by probate court of motion of brother of decedent to vacate decree of distribution, which confirmed in decedent's widow whatever title passed to her in

certain stock by virtue of death of decedent, was not an adjudication of title to the stock as between the widow and the brother. *Roberts v. Roberts*, 286 F 2d 647, 650.

CHAPTER 1301—EVIDENCE—INDIRECT—INFERENCES
AND PRESUMPTIONS

93-1301-5. (10604) Presumptions may be controverted, when.

Oral Lease

The presumption, under section 42-203, that when a tenant, pursuant to an oral agreement, enters into possession of real property his hiring of the property is pre-

sumed to be for one year, is rebuttable since it is not listed as a conclusive presumption in section 93-1301-6. *Roseneau Foods, Inc. v. Coleman*, — M —, 374 P 2d 87, 90.

93-1301-6. (10605) Specification of conclusive presumptions.

Oral Lease

Since the provision of section 42-203 that the hiring of real property under an oral lease is presumed to be for one year is not

listed as a conclusive presumption in this section it is a rebuttable presumption under 93-1301-5. *Roseneau Foods, Inc. v. Coleman*, — M —, 374 P 2d 87, 90.

93-1301-7. (10606) All other presumptions may be controverted.**Subd. 34****Ancient Documents**

Defendants failed to establish a prescriptive water right regardless of priority of rights, where depositions which were self-serving declarations were not admissible as ancient documents or public records as exceptions to hearsay rule and no other satisfactory proof of possession or use of the water was shown. *King v. Schultz*, — M —, 375 P 2d 108, 110.

Ancient documents may be admitted in evidence in proof of the facts recited

therein, provided the writers would have been competent to testify as to such facts. *King v. Schultz*, — M —, 375 P 2d 108, 110.

The ancient document rule, subd. 34 of this section, does not change the basis for admission of evidence other than as to the genuineness of the document. *King v. Schultz*, — M —, 375 P 2d 108, 110.

References

First Nat. Bank in Billings v. First Bank Stock Corp., 197 F Supp 417, 425.

CHAPTER 1401—EVIDENCE—INDISPENSABLE—UNWRITTEN AGREEMENTS—CONCLUSIVE—UNANSWERABLE

Section 93-1401-7. Agreement not in writing—when invalid.

93-1401-2. (10608) To prove perjury and treason, etc.**Operation and Effect**

This rule has no application where the accused admits on the stand, on the trial

for the offense, that he has committed the offense. *State v. Johnson*, — M —, 374 P 2d 504, 506.

93-1401-7. (10613) Agreement not in writing—when invalid. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:

1. An agreement that by its terms is not to be performed within a year from the making thereof.

2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 30-105.

3. An agreement made upon consideration of marriage, other than a mutual promise to marry.

4. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

This section shall not apply to agreements subject to the Uniform Commercial Code. [Effective January 1, 1965.]

History: En. Sec. 3276, C. Civ. Proc. 1895; re-en. Sec. 7969, Rev. C. 1907; re-en. Sec. 10613, R. C. M. 1921; amd. Sec. 11-171, Ch. 264, L. 1963. Cal. C. Civ. Proc. Sec. 1973.

Amendment

The 1963 amendment deleted former paragraph 4, for text of which see parent

volume; redesignated former paragraph 5 as 4; and added the final paragraph.

Oral Lease

An oral lease for more than a year is invalid, and evidence of the agreement and secondary evidence of its contents cannot be introduced. *Roseneau Foods, Inc. v. Coleman*, — M —, 374 P 2d 87, 89.

CHAPTER 1901—EVIDENCE—GENERAL RULES OF EXAMINATION**93-1901-11. (10668) How impeached.****Denial of Effort of Impeachment**

Defendant convicted of burglary in the first degree was granted a new trial because of refusal of trial court to allow defendant's offer of evidence of reputation

of alleged accomplice for truth and veracity as such action was a denial of effort of impeachment of the state's only eyewitness to the burglary. *State v. Laverdure*, — M —, 370 P 2d 489, 492.

CHAPTER 2702—COMMENCEMENT OF ACTION—SERVICE OF
PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Section 93-2702-2. Persons subject to jurisdiction—process—service.

93-2702-2. (Rule 4) Persons subject to jurisdiction—process—service. A.
* * * [Same as 1961 Supplement.]

B. [JURISDICTION OF PERSONS].

(1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

(a) to (f). * * * [Same as 1961 Supplement.]

(2). * * * [Same as 1961 Supplement.]

C. PROCESS.

(1). * * * [Same as 1961 Supplement.]

(2) [Summons]—Form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. In an action brought to quiet title to real estate, there shall be added to the foregoing, the following: "This action is brought for the purpose of quieting title to the land situated in _____ County, Montana, and described as follows: (Here insert description of land)." The provisions of sections 84-4165, R.C.M., and 93-6228, R.C.M., as well as the provisions hereinafter prescribed in D(5) (h), must be complied with.

D. SERVICE.

(1) to (3). * * * [Same as 1961 Supplement.]

(4) Other Service. All process in any form of action shall be served in the manner specified in this rule with the exception that whenever a statute of this state or an order of the court or a citation by the court made pursuant thereto provides for the service of a notice or of an order or of a citation in lieu of summons upon any person, service shall be made under the circumstances and in the manner prescribed by the statute or order or citation; and with the further exception that all persons are required to comply with the provisions of sections 40-2819, 40-3405, 40-3406, 40-3423, 40-3424, 93-6229, 93-6230, and 93-6232, when the action pertains to the provisions of such sections.

(5) Service by Publication—When Permitted—Effect—Manner—Proof.

(a) and (b). * * * [Same as 1961 Supplement.]

(c) Filing of Pleading and Affidavit for Service by Publication, and Order for Publication. Before service of the summons by publication is authorized in any case, there shall be filed with the clerk in the district court of the county in which the action is commenced (i) a pleading setting forth a claim in favor of the plaintiff and against

the defendant in one of the situations defined in 5(a) above; and (ii) in situations defined in (5)(a)(i), (5)(a)(ii), (5)(a)(iii), upon return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that such defendant resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons; or that the defendant, if a domestic or foreign corporation, has no agent for the service of process, nor managing nor business agent, cashier, secretary, or other officer who can, after due diligence, be found within the state; or, if the defendant is an unknown claimant, by showing that he has made diligent search and inquiry for all persons who claim, or might claim any right, title, estate, or interest in, or lien, or encumbrance upon, such property, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any right of dower, inchoate or accrued, and that he has specifically named as defendants in such action all such persons whose names can be ascertained; such affidavit shall be sufficient evidence of the diligence of any inquiry made by the affiant, if the affidavit recite the fact that diligent inquiry was made, and it need not detail the facts constituting such inquiry; and (iii) in the situation defined in (5)(a)(iv) above, there must first be presented to the court proof that a valid attachment or garnishment has been effected. Upon complying herewith, the plaintiff may obtain an order for the service of summons to be made upon the defendants by publication, which order may be issued by either the judge or the clerk of court.

(d) to (f). * * * [Same as 1961 Supplement.]

(g) When Service by Publication or Outside State Complete. Service by publication is complete on the date of the last publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, on the date of such service.

(h). * * * [Same as 1961 Supplement.]

(6) Service on Secretary of State. Unless otherwise provided by statute, whenever the secretary of state of the state of Montana has been appointed, or is deemed by law to have been appointed, as the agent to receive service of process for any person who cannot with due diligence be found or served personally within Montana, the party, or his attorney, shall make an affidavit stating the facts showing that the secretary of state is such agent, and stating the residence and last known post-office address of the person to be served, and shall file such affidavit with the clerk of the court in which such action is pending, accompanied by sufficient copies of such affidavit and of the summons and complaint for service upon the secretary of state, or whenever service is to be made upon certain corporations as provided in section 93-3008 of these codes, and the requirements of said section 93-3008 have been complied with; and there has also been deposited with the clerk of the court in which such action is pending the sum of five dollars to be paid to the secretary of state as a fee for the receipt of such service; then the clerk shall forward three copies of the

summons, complaint and affidavit, and the fee, to the sheriff of Lewis and Clark county for service on the secretary of state or his deputy by delivering thereto, and the sheriff shall make due return of such service.

Such service on the secretary of state shall be sufficient personal service upon the person to be served, provided that notice of such service and a copy of the summons and complaint are forthwith sent by registered or certified mail by the secretary of state to the party to be served at his last known address, marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said addressee, or the secretary of state shall be advised by the postal authority that delivery of said registered or certified mail was refused by said addressee. The date on which the secretary of state receives said return receipt, or advice by the postal authority that delivery of said registered or certified mail was refused, shall be deemed to be the date of service, and the court in which the action is pending may order such continuance as may be necessary to afford reasonable opportunity to defend the action. As an alternative to sending the notice and summons and complaint by registered or certified mail, as here provided, the secretary of state may cause notice of the service and a copy of the summons and complaint to be served by any qualified law enforcement officer, in accord with the procedure set out in D(1), (2) and (3) of this rule [section].

The secretary of state shall make an affidavit as to the service on him, and as to his mailing a copy of the summons and complaint and notice of such service, and as to the receipt of the return receipt or advice of the refusal of registered mail, and the respective dates thereof, and shall transmit such affidavit to the clerk of the court in which the action is pending, and it shall be filed in the cause. The secretary of state shall keep on file in his office a copy of the summons and complaint, and of his affidavit, and also keep a record which shall show the day and hour and manner of such service.

(7) to (10). * * * [Same as 1961 Supplement.]

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963.

Amendment

The 1963 amendment substituted "claim for relief" for "cause of action" in paragraph B (1); added the second and third sentences to paragraph C (2); substituted paragraph D (4) for a paragraph reading, "(4) Other Service. Whenever a statute of this state or an order of the court made pursuant thereto provides for the service of a summons or of a notice or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute or order"; inserted the words "in situations defined in (5)(a)(i), (5)(a)(ii), (5)(a)(iii)" at the beginning of clause (ii) of paragraph D (5) (c); added the final clause to the next to last sentence in paragraph D (5) (c); added the final

sentence of paragraph D (5) (c); substituted "on the date of" for "upon the expiration of 20 days after" and "upon the expiration of 20 days after the date of" in paragraph D (5) (g); inserted the words "or whenever service is to be made upon certain corporations as provided in section 93-3008 of these codes, and the requirements of said section 93-3008 have been complied with" in paragraph D (6); increased the secretary of state's fee specified in paragraph D (6) from \$3.00 to \$5.00; and made minor changes in phraseology and punctuation.

Repealing Clause

Section 2 of Ch. 189, Laws 1963 read "That the following sections of the Revised Codes of Montana, 1947, sections 53-204, 93-3004, 93-3009, 93-3010, 93-3019, 93-6206, 93-6207 and 93-6208, and all acts and parts of acts in conflict herewith, are hereby repealed."

DECISIONS UNDER FORMER LAW

Appearance by Defendant

A voluntary appearance by a defendant is equivalent to personal service of the summons and a copy of the complaint upon him. *Strnod v. Abadie*, — M —, 376 P 2d 730, 733.

Defendants Not Served

Persons named as defendants, but who were not served with process and did not enter an appearance, were not parties to the action for the purpose of determining their entitlement to witness fees. *Nelson v. Montana Iron Mining Co.*, — M —, 371 P 2d 874, 878.

93-2702-3. (Rule 5) Service and filing of pleading and other papers.

DECISIONS UNDER FORMER LAW

Denial of Rehearing

Where notice denying rehearing, required by section 92-833, was mailed by industrial accident board to claimant on February 24, 1960 and received February 25, 1960, notice of claimant's appeal to the district court served and filed on March 21, 1960, upon attorneys for the employer and insurer, was filed within time. *Antoff v. Greyhound Post Houses, Inc.*, 139 M 252, 362 P 2d 546, 547.

Notice by Mail

The supreme court lacked jurisdiction to entertain and determine an appeal when service of notice of appeal was made by mail and counsel for both parties resided in the same town. *Green v. Dan Morrison & Sons*, — M —, 368 P 2d 570, 571.

93-2702-4. (Rule 6) Time.

DECISIONS UNDER FORMER LAW

Memorandum of Costs

Where judgment of nonsuit was entered by defendant on May 31, 1960, memorandum of costs, served by mail postmarked June 5, 1960 met the requirements of sec-

tion 93-8619 since June 5th was the fifth day. In the computation of the time the first day is excluded as prescribed by section 90-407. *Davis v. Trobough*, 139 M 322, 363 P 2d 727, 730.

CHAPTER 2703—PLEADINGS AND MOTIONS

Section 93-2703-6. Defenses and objections—when and how presented—by pleading or motion—motion for judgment on pleadings.

93-2703-2. (Rule 8) General rules of pleading.

DECISIONS UNDER FORMER LAW

Voidable Release

Where plaintiff, in his reply, alleged that the release pleaded by defendant's answer was procured through fraud, raising an issue of fact concerning a voidable re-

lease, whether or not there was sufficient fraud to avoid the release was a question for the jury to determine under proper instruction. *Westfall v. Motors Ins. Corp.*, — M —, 374 P 2d 96, 99.

93-2703-6. (Rule 12) Defenses and objections—when and how presented—by pleading or motion—motion for judgment on pleadings. (a). * * *
[Same as 1961 Supplement.]

(b) **HOW PRESENTED.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) insufficiency of process, (4) insufficiency of service of process, (5) failure to state a claim upon which relief can be granted, (6) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a

further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 [93-2707-3], and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56 [93-2707-3].

(c). * * * [Same as 1961 Supplement.]

(d) **PRELIMINARY HEARINGS.** The defenses specifically enumerated (1)-(6) in subdivision (b) of this rule [section], whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule [section] shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) to (h). * * * [Same as 1961 Supplement.]

History: En. Sec. 12, Ch. 13, L. 1961;
amd. Sec. 1, Ch. 89, L. 1963.

Amendment

The 1963 amendment deleted from the first sentence of subd. (b) a clause reading, "(3) improper venue"; and made the necessary other changes in numbering of clauses and internal references.

Motion to Dismiss

Upon motions to dismiss under subd. (b) of this rule the allegations of the complaint must be viewed in a light most favorable to plaintiffs, admitting and accepting as true all facts well-pleaded. *Fulton v. Farmers Union Grain Terminal Assn.*, — M —, 374 P 2d 231, 236.

93-2703-9. (Rule 15) Amended and supplemental pleadings.

DECISIONS UNDER FORMER LAW

Failure of Proof

Where contract alleged was not proven but rather an attempt was made to prove an entirely different contract, there was not a variance but a failure of proof on behalf of the plaintiff within section 93-3903, R. C. M. 1947 (repealed by Laws 1961, ch. 13, sec. 84, effective January 1, 1962). *Fraser v. Williams*, — M —, 367 P 2d 769, 770.

Fatal Variance

In action by contractors against defendants to recover for work and labor alleged to have been performed and for materials alleged to have been furnished and delivered to defendants there was no fatal variance which misled or prejudiced defendants when the complaint although based on theory of quantum meruit, alleged that the labor and materials were furnished at the special instance and

request of defendants, and an express contract, full performance of which was prevented by defendants, was proven at trial. *Puetz v. Carlson*, 139 M 373, 364 P 2d 742, 746.

Relief From Judgments, Orders, or Other Proceedings

Default Judgment

District court did not abuse its discretion by refusing to open default taken on April 28, 1960 where defendant did not move to open the default until December 15, 1960. *Strnod v. Abadie*, — M —, 376 P 2d 730, 732.

The portion of section 93-3905, which allowed answer within one year after rendition of judgment did not cover a case where the district court acquired jurisdiction over defendant when he voluntarily appealed to answer the original complaint

through counsel. *Strnod v. Abadie*, — M —, 376 P 2d 730, 733.

Striking of Amended Pleading

Even though an amended pleading ordi-

narly renders the original pleading functus officio, the original pleading is reinstated if the amended pleading is stricken. *Monarch Lumber Co. v. Haggard*, 139 M 105, 360 P 2d 794.

CHAPTER 2704—PARTIES

93-2704-2. (Rule 18) Joinder of claims and remedies.

DECISIONS UNDER FORMER LAW

Fraudulent Conveyance

Under section 29-101 et seq., the Uniform Fraudulent Conveyances Act, a creditor may join with his cause of action alleging indebtedness a second cause of action alleging that debtor's giving of mortgages and conveyance of certain prop-

erty was without fair consideration and made him insolvent, and a third cause of action alleging that after executing the mortgages, he had unreasonably small capital in his business. *Cahill-Mooney Constr. Co. v. Ayres*, — M —, 373 P 2d 703, 709.

93-2704-3. (Rule 19) Necessary joinder of parties.

DECISIONS UNDER FORMER LAW

Quiet Title Action

In an action to quiet title to a house and lot, which included unknown claimants as defendants, where the scrivener of the deed erred in misnaming the corporate grantee, it was error to strike demurrer of corporate defendant alleging that the

complaint failed to state a cause of action against the defendant and defendant was not required to intervene. *Williams v. Widows and Orphans Home, Veterans of Foreign Wars of Eaton Rapids, Mich.*, — M —, 373 P 2d 948, 950.

93-2704-4. (Rule 20) Permissive joinder of parties.

DECISIONS UNDER FORMER LAW

Intimate Connection of Parties

In an action under the Declaratory Judgments Act (93-8901 to 93-8916) by insured against insurer, which had issued a policy covering commercial hauling of trailer homes, the insurer's general agent, and local insurance agent, district court was not in error in overruling insurer's demurrer on grounds of misjoinder of causes of action and parties defendant, contending that action against the local agent being one for tort and action against the insurer and general agent being based on

a contract could not be combined, which defect could not be cured by a declaratory judgment, since the rights of all of the parties were intimately connected by the one transaction and the presence of all of the parties was necessary to a determination of their rights. The liability of the insurer depended upon the existence of an amendment to the contract and the liability of the local agent depended upon an absence of that same amendment. *Adams & Gregoire, Inc. v. National Indemnity Co.*, — M —, 375 P 2d 112, 115.

93-2704-8. (Rule 24) Intervention.

DECISIONS UNDER FORMER LAW

Interest in the Matter in Litigation

A retail merchant, a citizen and resident of Montana, who competed with other merchants giving or not giving trading stamps, had an interest in an action by another retailer against the state board of equalization for a declaratory judgment that Chapter 153, Laws of 1961 (sections 84-2805 to 84-2812), providing for the

licensing of any merchant advertising or giving trading stamps or devices defined in such act, was unconstitutional, and should have been permitted to intervene under this section in support of the constitutionality of such statute. *State ex rel. Abel v. District Court*, — M —, 368 P 2d 572, 576.

Right to Disqualify Judge

An intervener, being a party to the action, is entitled to avail himself of the provisions of section 93-901 and in a proper situation may file an affidavit of disqualification. *Allman v. Potts*, — M —, 371 P 2d 11, 13.

Wrongful Death Action

District court was directed to deny petition of decedent's divorced wife, guardian

ad litem of decedent's and her children, to intervene in action for wrongful death under section 93-2810 commenced by the widow as administratrix and trustee for the decedent's minor children, and to strike from the files the complaint in intervention as an attempted substitution of party plaintiffs in a wrongful death action. *State ex rel. Carroll v. District Court*, 139 M 367, 364 P 2d 739, 742.

CHAPTER 2705—DEPOSITIONS AND DISCOVERY

93-2705-1. (Rule 26) Depositions pending action.

DECISIONS UNDER FORMER LAW

Admission of Deposition

District court did not err in failing to admit into evidence a deposition of witness which was taken before the trial where default had been entered at the time of trial, although he was a party to the record; his testimony at the trial

did not materially deviate from that contained in the deposition; and material matters covered by the deposition were not omitted in his testimony at the trial. *Walsh-Anderson Co. v. Keller*, 139 M 210, 362 P 2d 533, 538.

CHAPTER 2706—TRIALS

Section 93-2706-4. Dismissal of actions.

93-2706-4. (Rule 41) Dismissal of actions. (a) to (d). * * * [Same as 1961 Supplement.]

(e) No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been served and return made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years.

History: En. Sec. 41, Ch. 13, L. 1961; amd. Sec. 1, Ch. 111, L. 1963.

Amendment
The 1963 amendment added subd. (e).

DECISIONS UNDER FORMER LAW

Judgment of Nonsuit

Trial court did not err in granting a nonsuit against plaintiff in action by truck driver against automobile owner for injuries arising out of accident when the daughter of the owner of the automobile forced truck off the highway where plain-

tiff did not prove ownership or the identity of the automobile involved in the accident as belonging to defendant and the record was silent as to any proof upon the question of agency. *Castle v. Thisted*, 139 M 328, 363 P 2d 724, 726.

93-2706-6. (Rule 43) Evidence.

DECISIONS UNDER FORMER LAW

Re-examination of Adverse Witness

Where plaintiff in his case in chief called one of the defendants to the wit-

ness stand, and cross-examined him as permitted by section 93-1901-9, trial judge did not abuse his discretion in denying motion

of counsel for defendants for right to re-examine such defendant, where he was called to the stand in defendants' case in chief, less than two hours after he had been excused as an adverse witness, and

counsel for defendants completed their examination of him that same day. *Wyant v. Dunn*, — M —, 368 P 2d 917, 921. (Dissenting opinion, — M —, 368 P 2d 917, 924.)

93-2706-13. (Rule 50) Motion for a directed verdict.

Disqualification of Trial Judge

This rule does not apply to the disqualification of a trial judge which is

governed by section 93-901. *State ex rel. Bellon v. District Court*, — M —, 373 P 2d 314, 316.

93-2706-14. (Rule 51) Instructions to jury—objection.

DECISIONS UNDER FORMER LAW

Objections Available on Appeal

An objection to an instruction which was not advanced at the time of settling the instructions is not properly available on appeal to the supreme court. *Holland Furnace Co. v. Rounds*, 139 M 75, 360 P 2d 412.

objection to an instruction before the trial court they were precluded from raising it in the supreme court on appeal. *Franek v. Hudson*, — M —, 373 P 2d 951, 953.

A mere objection to an instruction without assignment of the specific reason for the objection is not a proper objection. *Adams & Gregoire, Inc. v. National Indemnity Co.*, — M —, 375 P 2d 112, 116.

Specific Objections Required

Where plaintiffs did not make a specific

CHAPTER 2707—JUDGMENT

93-2707-2. (Rule 55) Default.

DECISIONS UNDER FORMER LAW

Negligence of Attorney

Attorney was deprived of the right to practice in the courts of Montana for 45 days where he was guilty of deliberate falsehood in telling client that case filed in April 1956 was at issue and was await-

ing trial, the debtor in the action having entered no appearance and default judgment such as was entered on April 11, 1961, could have been entered in June of 1956. *In re Hirst*, — M —, 368 P 2d 157, 158.

93-2707-5. (Rule 58) Entry of judgment.

DECISIONS UNDER FORMER LAW

Final Judgment

Judgment became final on April 20, 1959, when entered by the clerk of the district court, although appellant's counsel moved

to modify the judgment on May 21, 1959, and the trial court overruled the motion on August 14, 1959. *Hursh v. Mon-O-Co. Oil Corp.*, 139 M 302, 363 P 2d 485, 486.

93-2707-6. (Rule 59) New trials—amendment of judgments.

Condemnation Proceedings

Subd. (e) of this rule did not apply in determining right of district to alter or amend an award of damages as found by the report of commissioners in condemnation proceeding under section 93-9914 after the award had been filed with the district court and notice thereof given to the parties by the clerk as the commissioners'

award was not a judgment. *State ex rel. Frelich v. District Court*, — M —, 375 P 2d 1016, 1018.

Disqualification of Trial Judge

This rule does not apply to the disqualification of a trial judge which is governed by section 93-901. *State ex rel. Bellon v. District Court*, — M —, 373 P 2d 314, 316.

93-2707-7. (Rule 60) Relief from judgment or order.

DECISIONS UNDER FORMER LAW

Excusable Neglect

Trial court did not abuse its discretion in refusing to vacate a default judgment

where the facts advanced as "excusable neglect" were that defendant's counsel failed to read a letter from plaintiff's

counsel for two or three weeks because he was occupied with other urgent matters and because he assumed that the letter was on another matter that was not ur-

gent. (Angstman and Adair dissenting.) United States Rubber Co. v. Community Gas & Oil Co., 139 M 36, 359 P 2d 375.

93-2707-8. (Rule 61) **Harmless error.**

DECISIONS UNDER FORMER LAW

Hypothetical Questions

Defendant tractor owner was not prejudiced by the court's allowing highway patrolman to answer hypothetical questions which assumed, among other facts, that a driver in a position the same as that of plaintiff's decedent was watching the right side of the road as he passed the glare of the tractor headlights where it had been previously established that decedent could not have avoided hitting the tractor-trailer had he been looking directly ahead. Hurly v. Star Transfer Co., — M —, 376 P 2d 504, 507.

Modification of Judgment

In action by sellers of hotel business against buyers for balance due on contract, findings of district court that damages found for buyers would never exceed amount owed to sellers, and denial of recovery to sellers, did not void judgment and it was modified on appeal giving judgment to sellers for difference between that owed on the contract and total damages that buyers would sustain. Swecker v. Badura, — M —, 377 P 2d 752, 756.

CHAPTER 2711—GENERAL PROVISIONS

- Section 93-2711-6. Appendix of forms.
93-2711-7. Special statutory proceedings under Rule 81.

93-2711-6. Appendix of forms.

[Forms 1 to 22. Same as 1961 Supplement.]

Form 23. Supersedeas Bond.

We the undersigned jointly and severally acknowledge that we and our personal representatives are jointly bound to pay to (respondent) the sum of \$.....

(Appellant) has appealed from that certain judgment (or order) (insert descriptive facts) and has obtained an order staying execution from the district court, and the condition of this bond is that if the judgment (or order) appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay the amount directed to be paid by the judgment (or order) or the part of such amount as to which the judgment (or order) is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal. If such payment be made then this bond is void, otherwise to be and remain in full force and effect. If the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

----- Appellant -----	----- Address -----
----- Surety -----	----- Address -----
----- Surety -----	----- Address -----

(Justification of Sureties)
Form of bond approved.

Judge

(This form with necessary alterations may be used in any situation covered by Rule 62 [93-2707-9].)

History: En. Sec. 80, Ch. 13, L. 1961;
amd. Sec. 1, Ch. 3, L. 1963.

Amendment
The 1963 amendment added Form 23.

93-2711-7. (Table A) Special statutory proceedings under Rule 81.

Following is a list of sections of the Revised Codes of Montana, 1947, as amended, pertaining to special proceedings which are excepted from these rules in so far as they are inconsistent or in conflict with the procedure and practice provided by these rules:

Review of beer license, revocation, suspension or denial.....	4-342
Review of liquor license revocation, suspension, or denial.....	4-425
Closed bank proceedings.....	5-1107
Review of decision of superintendent of banks.....	5-1108
Appeal from decision of superintendent of banks.....	5-1112
Closed banks, procedure for disposition of assets.....	5-1118
Appointment of trustee of cemetery association.....	9-121
Removal of dedication of property for cemetery.....	9-816, 9-817
Proceedings re dependent and neglected children.....	Title 10, Ch. 5
Juvenile courts	Title 10, Ch. 6
Appeal from city approval of emergency expenditures.....	11-1409
Appeal from appraisalment of damage to landowner caused by change of grade of street or sidewalk.....	11-2604, 11-2605
Review of decision of municipal board of adjustment re zoning regulations.....	11-2707
Determination of title to lots in entry townsites.....	11-3014, 11-3026
Formation of agricultural or co-operative corporations or districts	14-302 to 14-304
Creation of indebtedness of same.....	14-319, 14-320
Lost or destroyed stock certificates.....	15-644
Dissolution of corporations	15-1108 to 15-1114
Assignments for benefit of creditors.....	18-314 to 18-326
Contesting nominations	23-926 to 23-928
Recount of votes	23-2301 to 23-2304
Appeal from revocation of oleomargarine license.....	27-517
Appeal from revocation of driver's license.....	31-152
Appraisalment of homestead subject to execution.....	33-109 to 33-123
Insane, examination and commitment.....	38-201 to 38-214
Same, voluntary	38-401 to 38-412
Eugenical sterilization law	38-606
Inebriates, commitment	38-701 to 37-711
State training school, commitment to.....	38-801 to 38-819
Senile aged, commitment	38-1101 to 38-1112
Insurance Code effective January 1, 1961:	
Appeals from commissioner of insurance.....	40-2725

Service of process	40-2818, 40-2819
Unauthorized insurers—service of process, defense of actions, attorneys' fees	40-3403 to 40-3408
Surplus lines, service of process.....	40-3423, 40-3424
Prohibited or undefined trade practices—injunction proceed- ings, and appeals from commissioner's report.....	40-3514, 40-3515
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Delinquency proceedings against insurance companies.....	40-5101 to 40-5133
Fraternal benefit societies, service of process.....	40-5352
Fraternal benefit societies, injunction and quo warranto pro- ceedings	40-5356, 40-5357
Grazing district appeal procedure.....	46-2308
State mine inspector, procedure for investigation of charges of neglect of duty	50-410
Review of order of Montana trade commission.....	51-113
Appeal from decision of highway patrol supervisor.....	53-419
Review of orders of oil and gas conservation commission.....	60-135
Uniform Adoption Act	61-201 to 61-217
Appeal from decision of board of medical examiners.....	66-1004
Review of order of board of pharmacy.....	66-1509
Commitment to state tuberculosis hospital.....	69-307 to 69-310 and 69-313
Establishing birth	69-522
Review of decision of board of health or water pollution council.....	69-1335
Review of actions of public service commission.....	70-128
Review of action of board of railroad commissioners.....	72-125
Review of school trustees' resolution to sell school property.....	75-1634
Compulsory attendance at school.....	75-2901
State industrial school, commitment.....	75-3001, 75-3002
State industrial school	80-810 and 80-815 to 80-817
State vocational school, commitment	80-918 to 80-921
Female reformatories, commitment	80-1002, 80-1003
Proceedings to abate fire hazards.....	82-1219 to 82-1222
Appeal from decision of commissioner of agriculture.....	84-3410 to 84-3412
Action to confirm tax deed.....	84-4144 to 84-4150
Action to quiet title to tax deed property.....	84-4158
Action to procure tax deed.....	84-4162 to 84-4169
Complaint in action to collect taxes by suit.....	84-4302
Cigarette tax appeal	84-5617
Administration of trusts	86-315 to 86-326
Review of order of unemployment compensation commission.....	87-108
Insecure dams	89-702 to 89-714
Creation of irrigation districts	89-1201 to 89-1204
Irrigation districts—changing boundaries, correcting errors, fixing taxable acreage, etc.	Title 89, Ch. 14
Confirmation of resolution authorizing bonds for irrigation district.....	89-1704
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Procedure to mortgage or lease by guardians.....	91-4911
Property sale by guardians.....	91-5005 to 91-5013
Guardians of nonresidents	Title 91, Ch. 51
Examination and removal of guardians, etc.....	91-5201, 91-5202
Proceedings supplementary to execution.....	93-5901 to 93-5913
Actions to establish title to property granted to heirs of deceased's entrymen	93-6225 to 93-6239
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Bastardy proceedings	94-9901 to 94-9908
Habeas corpus	94-101-1 to 94-101-33
Uniform Reciprocal Enforcement of Support Act.....	94-901-1 to 94-901-18

History: En. Sec. 81, Ch. 13, L. 1961;
amd. Sec. 1, Ch. 190, L. 1963.

Amendment

The 1963 amendment substituted the line concerning sections 93-6225 to 93-6239 for a line reading, "Quiet title (including actions to establish property granted to heirs of deceased entrymen)-----93-6201 to 93-6239."

Rules Superseding Statutes

Section 3, Ch. 14, Laws 1963, deleted from Table B the entry which showed Rule 25 superseding section 93-2824, retroactive to January 1, 1962.

Section 2, Ch. 190, Laws 1963, added to Table B entries showing Rule 4 superseding sections 53-204, 93-3004, 93-3009, 93-3010, 93-3019, 93-6206, 93-6207, and 93-6208.

Statutes Superseded by Rules

Section 4, Ch. 14, Laws 1963, deleted from Table C the entry which showed section 93-2824 superseded by Rule 25, retroactive to January 1, 1962.

Section 3, Ch. 190, Laws 1963, added to Table C entries showing sections 53-204, 93-3004, 93-3009, 93-3010, 93-3019, 93-6206, 93-6207, and 93-6208 all superseded by Rule 4.

CHAPTER 2801—RULES OF PRACTICE ADOPTED BY SUPREME COURT

- Section 93-2801-1. Power of supreme court over rules in civil actions—scope of rules.
 93-2801-2. Advisory committee on rules.
 93-2801-3. Distribution of proposed rules to bench and bar—petitions of professional associations.
 93-2801-4. Local rules of practice.
 93-2801-5. Administrative practice rules unaffected.
 93-2801-6. Continuation of existing laws and rules.
 93-2801-7. Effective date of rules.
 93-2801-8. Legislative power reserved.

93-2801-1. Power of supreme court over rules in civil actions—scope of rules. The supreme court of this state shall have the power to regulate the pleading, practice, procedure, and the forms thereof in civil actions in all courts of this state, by rules promulgated by it from time to time, for the purpose of simplifying judicial proceedings in the courts of Montana and for promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant and shall not be inconsistent with the constitution of the state of Montana.

History: En. Sec. 1, Ch. 16, L. 1963.

Title of Act

An act authorizing and empowering the supreme court of the state of Montana to regulate by rules, the pleading, practice

and procedure in civil cases in the courts of the state of Montana, for the purpose of simplifying judicial proceedings and promoting the speedy determination of litigation upon its merits.

93-2801-2. Advisory committee on rules. Before any rules are adopted the supreme court shall appoint an advisory committee consisting of eight members of the bar of the state and at least three judges of the district court to assist the court in considering and preparing such rules as it may adopt.

History: En. Sec. 2, Ch. 16, L. 1963.

93-2801-3. Distribution of proposed rules to bench and bar—petitions of professional associations. Before any rule is adopted, the supreme court shall distribute copies of the proposed rule to the bench and bar of the state for their consideration and suggestions and give due consideration to such suggestions as they may submit to the court. The Montana Bar Association or the Association of Montana Judges may file with the supreme court a petition specifying their suggestions concerning any existing or proposed rule and requesting a hearing thereon within six (6) months after the filing of the petition.

History: En. Sec. 3, Ch. 16, L. 1963.

93-2801-4. Local rules of practice. Any district court and the supreme court, may adopt rules of court governing its practice so long as such rules are not in conflict with the rules promulgated by the supreme court of the state of Montana, in accordance with this act.

History: En. Sec. 4, Ch. 16, L. 1963.

93-2801-5. Administrative practice rules unaffected. This act shall not affect the power of any constitutional or statutory commission or board to make rules governing its practice.

History: En. Sec. 5, Ch. 16, L. 1963.

93-2801-6. Continuation of existing laws and rules. All present laws and rules relating to pleading, practice and procedure, shall be effective as rules of court until modified or superseded by subsequent court rule, and upon the adoption of any rule pursuant to this act such laws and rules, in so far as they are in conflict therewith, shall thereafter be of no further force and effect.

History: En. Sec. 6, Ch. 16, L. 1963.

93-2801-7. Effective date of rules. All rules promulgated under this act shall be effective at a time fixed by the supreme court.

History: En. Sec. 7, Ch. 16, L. 1963.

93-2801-8. Legislative power reserved. This act shall not abridge the right of the legislature to enact, modify, or repeal any statute or modify or repeal any rule of the supreme court adopted pursuant thereto.

History: En. Sec. 8, Ch. 16, L. 1963.

CHAPTER 2901—SUPPORT OF CHILDREN BORN OUT OF WEDLOCK

Section	93-2901-1.	Obligations of the father.
	93-2901-2.	Enforcement.
	93-2901-3.	Limitation on recovery from the father.
	93-2901-4.	Limitations on recovery from father's estate.
	93-2901-5.	Remedies.
	93-2901-6.	Time of trial.
	93-2901-7.	Judgment.
	93-2901-8.	Security.
	93-2901-9.	Venue.
	93-2901-10.	Uniformity of interpretation.
	93-2901-11.	Operation and repeal.

93-2901-1. Obligations of the father. The father of a child which is or may be born out of wedlock is liable to the same extent as the father of a child born in wedlock, whether or not the child is born alive, for the reasonable expense of the mother's pregnancy and confinement and for the education, necessary support and funeral expenses of a child. A child born out of wedlock includes a child born to a married woman by a man other than her husband; provided, however, nothing herein contained shall affect the presumptions of legitimacy otherwise provided by statute.

History: En. Sec. 1, Ch. 233, L. 1963.

Title of Act

An act imposing upon the father of an

illegitimate child a duty of support; establishing a civil action for the determination of parentage of an illegitimate child.

93-2901-2. Enforcement. Paternity may be determined upon the complaint of the mother, child, or the public authority chargeable by law with the support of the child. If paternity has been determined, the liabilities of the father may be enforced in the same or other proceedings (1) by the mother, child, or the public authority which has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses, and (2) by other persons including private agencies to the extent that they have furnished the reasonable

expenses of pregnancy, confinement, education, necessary support, or funeral expenses.

History: En. Sec. 2, Ch. 233, L. 1963.

93-2901-3. Limitation on recovery from the father. The father's liabilities for past education and necessary support are limited to a period of four years next preceding the commencement of a proceeding.

History: En. Sec. 3, Ch. 233, L. 1963.

93-2901-4. Limitations on recovery from father's estate. The obligation of the estate of the father for liabilities under this act is limited to amounts accrued prior to his death.

History: En. Sec. 4, Ch. 233, L. 1963.

93-2901-5. Remedies. The district court has jurisdiction of a proceeding under this act and all remedies for the enforcement of judgments for expenses of pregnancy and confinement for a wife or for education, necessary support, or funeral expenses for legitimate children apply. The court has continuing jurisdiction to modify or revoke a judgment for future education and necessary support. All remedies under the Uniform Reciprocal Enforcement of Support Act are available for enforcement of duties of support under this act.

History: En. Sec. 5, Ch. 233, L. 1963.

93-2901-6. Time of trial. If the issue of paternity is raised in a proceeding commenced during the pregnancy of the mother, the trial shall not, without the consent of the alleged father, be held until after the birth or miscarriage but during such delay testimony may be perpetuated according to the laws of this state.

History: En. Sec. 6, Ch. 233, L. 1963.

93-2901-7. Judgment. Judgments under this act may be for periodic payments which may vary in amount. The court may order payments to be made to the mother or to some person, corporation, or agency designated to administer them under the supervision of the court.

History: En. Sec. 7, Ch. 233, L. 1963.

93-2901-8. Security. The court may require the alleged father to give bond or other security for the payment of the judgment.

History: En. Sec. 8, Ch. 233, L. 1963.

93-2901-9. Venue. A proceeding under this act may be brought in the county where the alleged father is present or has property or in the county where the mother resides.

History: En. Sec. 9, Ch. 233, L. 1963.

93-2901-10. Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 10, Ch. 233, L. 1963.

93-2901-11. Operation and repeal. This act applies to all cases of birth out of wedlock as defined in this act where birth occurs after this act takes effect.

History: En. Sec. 11, Ch. 233, L. 1963.

REVISED CODES OF MONTANA

VOLUME 7 1961 Cumulative Pocket Supplement

Containing

AMENDMENTS TO ACTS AND NEW LAWS ENACTED BY THE
LEGISLATIVE ASSEMBLY SINCE PUBLICATION OF THE
1947 REVISED CODES

AND

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93-201. (8790) Justices—number increased to five, etc.**Cross-Reference**

Assistant law librarian to act as law clerk, sec. 44-408.

93-207. (8796) Repealed.**Repeal**

This section (Sec. 1, Ch. 43, L. 1905), fixing the salaries of the justices of the supreme court, was repealed, as Sec. 8796,

Revised Codes, 1935, by Sec. 4, Ch. 182, Laws 1949. For present law, see sec. 25-501.

93-212. (8801) Decisions to be in writing.**References**

Cited or applied in State ex rel. Olsen v.

Public Service Commission, 131 M 104, 308 P 2d 633, 635.

93-214. (8803) Original jurisdiction.**Injunction**

Supreme Court declined jurisdiction in action for injunction to restrain county officials from drawing or issuing certain warrants where numerous questions of fact were present which would require the taking of testimony and submission of other evidence which could be more speedily done in district court. Porter v. Thielen, 124 M 607, 214 P 2d 743.

Writ of Prohibition

The writ of prohibition may be is-

sued to end litigation and save expense. State ex rel. Adami v. Lewis and Clark County, 124 M 282, 220 P 2d 1052, 1054.

Supreme Court had jurisdiction to grant writ of prohibition to prevent payment of grand jury illegally in session. State ex rel. Adami v. Lewis and Clark County, 124 M 282, 220 P 2d 1052.

References

Cited in State ex rel. Lay v. District Court, 122 M 61, 198 P 2d 761, 765; Application of Cowan, 131 M 509, 312 P 2d 124.

93-215. (8804) Appellate jurisdiction.**References**

Cited or applied in Bond v. Birk, 126 M 250, 247 P 2d 199, 206.

93-216. (8805) Powers and duties of supreme court on appeals.**Equity Appeals**

In an equity case, where no cause appears why a new trial or the taking of further evidence should be ordered, it is

the court's duty to finally determine the same. Fey v. A. A. Oil Corporation, 129 M 300, 285 P 2d 578, 589.

Equity Cases

Under this section the Supreme Court is authorized in reviewing the decrees in equity cases, where all of the facts were presented on an appeal and showed that the cause was ripe for an ultimate decision, to make such disposition of the case as the court below ought to have made; the reluctance of an occasional judge to abide by and apply the foregoing mandates of the legislature neither repeals nor changes the statute. *Bond v. Birk*, 126 M 250, 247 P 2d 199, 205, 206.

Separate maintenance action by wife, being an equity case, Supreme Court had the right and duty to review the facts, but this power or duty did not necessarily require the overturning of the findings made by the trial judge. *Reynolds v. Reynolds*, 132 M 303, 317 P 2d 856, 857.

Findings of trial judge will be sustained by Supreme Court where the evidence is conflicting, since he had the advantage of having seen the witnesses and observed their demeanor and appearance, and hence was in a better position to judge of their credibility. *Reynolds v. Reynolds*, 132 M 303, 317 P 2d 856, 857.

In entering upon a review of the evidence on appeal in equity case, Supreme Court indulges the presumption that the judgment of the trial court is correct, and will draw every legitimate inference therefrom to support the presumption. *Havre Irrigation Co. v. Majerus*, 132 M 410, 318 P 2d 1076, 1078.

It is the trial court's office to resolve inconsistencies in the testimony, and where the evidence, fully considered, furnishes reasonable grounds for different conclusions the findings of the trial court will not be disturbed by the Supreme Court on appeal. *Havre Irrigation Co. v. Majerus*, 132 M 410, 318 P 2d 1076, 1078.

In an equity action, the Supreme Court will review all questions of law and fact presented in the record on appeal. *Havre Irrigation Co. v. Majerus*, 132 M 410, 318 P 2d 1076, 1078; *Tillinger v. Frisbie*, 132 M 583, 318 P 2d 1079, 1083.

Appeals in equity require a disposal by the Supreme Court which will put an end to litigation and avoid the necessity of new trials involving expense and the contingencies incident to delay. *Bradbury v. Nagelhus*, 132 M 417, 319 P 2d 503, 510.

Examination of Evidence in Equity Proceedings and Disposition of Cases

In equity cases Supreme Court has right to make independent findings of fact after a review of all evidence, but if there is in the record substantial evidence supporting the findings of the trial court Supreme Court will not interfere with those findings. *Sanders v. Sanders*, 124 M 595, 229 P 2d 164, explained in 353 P

2d 328; 354 P 2d 183. (The court was evenly divided on this point, see dissenting opinion.)

Function of Supreme Court as to Questions of Fact

In an equity case on appeal the court reviews all questions of fact arising upon the evidence presented and determined such questions of fact as well as the questions of law, unless for good cause, a new trial or the taking of further evidence is ordered in the court below. *Hart v. Barron*, 122 M 350, 204 P 2d 797, 804.

Operation and Effect

Under the power granted to the Supreme Court by this section, the court may direct that a proper judgment be entered in any case. Thus in a quiet title action, where the lower court found that at the time of the commencement of the action the plaintiff was in ownership, but the judgment states that since the filing of the complaint and at all times thereto the plaintiff was in ownership, the judgment is modified to conform with the findings. *Warren v. Warren*, 127 M 259, 261 P 2d 364, 366.

Remand to District Court

The Supreme Court has power to remand a case to the district court with directions that certain further action be taken by it. In *re Stoian's Estate*, — M —, 357 P 2d 41, 45.

On the remand of the cause after appeal, it is the duty of the lower court to comply with the mandate of the Supreme Court and to obey the directions therein. The trial court commits error if it fails to follow the directions of the Supreme Court. In *re Stoian's Estate*, — M —, 357 P 2d 41, 45.

Stipulation of Facts

Where the facts set forth in opinion were stipulated and no objections made to their sufficiency or correctness, the Supreme Court is in as advantageous a position to do justice in the cause as was the trial court. No presumption obtains in such a case as to the correctness of the trial court's decision since supreme court is empowered to completely review the record. *Pluhar v. Guderjahn*, 134 M 46, 328 P 2d 129, 131, 132.

References

Cited or applied in *Miller v. Miller*, 121 M 55, 190 P 2d 72; *Seaton Ranch Co. v. Montana Vegetable Oil & Feed Co.*, 123 M 396, 217 P 2d 549, 553; *Higby v. Hooper*, 124 M 331, 221 P 2d 1043, 1048; *Sullivan v. Marsh*, 124 M 415, 225 P 2d 868, 871; *Sheridan County Electric Co-op. v. Anhalt*, 127 M 71, 257 P 2d 889, 893; *Rooney v. Ford*, 127 M 92, 256 P 2d 1090,

1093, 1094; *Erdmann v. Erdmann*, 127 M 252, 261 P 2d 367, 370; *In re Sikorski's Estate*, 127 M 563, 268 P 2d 395, 399; *In re Stoian's Estate*, 128 M 52, 269 P 2d 1085, 1089 (dissenting opinion); *In re Minder's Estate*, 128 M 1, 270 P 2d 404, 408, 45 ALR 898; *Hjermstad v. Barkuloo*, 128 M 88, 270 P 2d 1112, 1118; *In re Spoya's Estate*, 129 M 83, 282 P 2d 452, 457; *Bennett v. Dodgson*, 129 M 228, 284 P 2d 990, 994; *Richland County v. Anderson*, 129 M 559, 291 P 2d 267, 274; *Hansen v. Hansen*, 130 M 175, 297 P 2d 879, 884; *Reed v. Reed*, 130

M 409, 304 P 2d 590, 593 at 605 (dissenting opinion); *Hansen v. Hansen*, 130 M 496, 304 P 2d 1107, 1108; *Bronson v. Gillan*, 131 M 296, 309 P 2d 625, 628; *Platts v. Platts*, 134 M 474, 334 P 2d 722, 727; *Mountain States Telephone & Telegraph Co. v. Public Service Commission*, 135 M 170, 338 P 2d 1044, 1047; *George v. Fish Creek Irrigation Co.*, 135 M 490, 342 P 2d 738; *Schulz v. Fox*, — M —, 345 P 2d 1045, 1048; *Roth v. Palutzke*, — M —, 350 P 2d 358, 359.

93-219. Judge becoming candidate for elective office—resigning of supreme court office—exceptions—vacancy. Whenever any person holding or occupying the office of chief justice or associate justice on the supreme court of the state of Montana shall become a candidate for election to any elective office under the laws of/or in the state of Montana, such person shall forthwith, and in any event at or before the time required for such person to file as a candidate for such office at any primary or special or general election, resign said office of chief justice or associate justice of said supreme court except where such person is a bona fide candidate for re-election to the identical office then held or occupied by him or for another non-partisan judicial office the term of which shall commence not earlier than the end of the term of the office then held or occupied by such justice and said resignation shall become effective forthwith on delivery of the same to the proper officer or superior, and in the event of failure so to resign said office of chief justice or associate justice of said supreme court or of district judge of any of said district courts the same shall, ipso facto, become wholly vacant and unoccupied and the said former holder or occupant shall have no further right, power, or authority therein for any purpose, and no right to any emoluments thereof, notwithstanding the fact that a successor is not appointed or elected; and said vacancy shall become operative to deprive any person of the emoluments of said office then held in order to carry out the policy of this act.

History: En. Sec. 1, Ch. 139, L. 1957.

Title of Act

An act providing that any justice of the supreme court of the state of Montana who becomes a candidate for any elective office except as a bona fide candidate for re-election to the office then occupied by such justice shall at or before filing for

said elective office as required by law resign the office then held; providing that the office of any said justice of the said supreme court failing to so resign shall become vacant; giving directions with reference to the filling of such vacancy and for the repeal of any and all acts, statutes or code provisions in conflict therewith; and providing for an effective date.

93-220. Filling vacancy. In all cases the proper appointing or other power shall promptly fill all vacancies occurring because of the provisions of this act by appointment of competent and qualified persons according to law.

History: En. Sec. 2, Ch. 139, L. 1957.

Repealing Clause

Section 3 of Ch. 139, Laws 1957 read "All acts and parts of acts, statutes and/or code provisions inconsistent herewith are, and each thereof is, hereby expressly repealed."

Effective Date

Section 4 of Ch. 139, Laws 1957 provided the act should be in effect from and after its passage and approval. Approved March 7, 1957.

93-221. Intention and purpose of act—adoption of Federal Rules of Civil Procedure. The intent and purpose of this act is to make possible the adoption of the Federal Rules of Civil Procedure so far as seems presently practicable to the existing Montana Code to the end of uniformity, but not at the expense of existing procedural statutory rules that may be better for Montana state practice.

History: En. Sec. 1, Ch. 255, L. 1959.

Title of Act

An act authorizing and empowering the supreme court of the state of Montana to recommend rules of pleading, practice and procedure in civil cases in the courts of the state of Montana, for the purpose of simplifying judicial proceedings and promoting the speedy determination of litigation upon its merits; creating a commission to prepare suggested rules of procedure of the state of Montana and prescribing the membership and powers and duties of said commission; providing for

employment of a secretary-stenographer of the commission and employment of research agencies, if deemed necessary; providing for the payment of actual travel and other expenses incurred by members of said commission in the discharge of their duties; providing that such recommended rules of pleading, practice and procedure shall be submitted to the thirty-seventh legislative assembly of the state of Montana for its consideration; repealing all acts and parts of acts in conflict herewith and providing for an effective date of this act.

93-222. Commission — appointment — duties. That within thirty (30) days following the adjournment of this legislative assembly, the supreme court of Montana shall appoint a commission of eleven (11) persons, which commission shall meet and organize itself within thirty (30) days following appointment; and which commission shall make a complete study, consider and finally prepare Rules of Civil Procedure of the state of Montana, which rules shall be comprehensive in scope, except as limited by the statement of intent set forth in section 1 [93-221] of this act.

History: En. Sec. 2, Ch. 255, L. 1959.

93-223. Members of commission—selection. The commission shall be composed of the chief justice of the supreme court of the state of Montana, or an associate justice of the supreme court designated by the chief justice, three (3) judges from the district courts of the state, and seven (7) lawyers. At least five (5) of these lawyer-members of the commission shall be members of the Montana bar association and all of the lawyers designated shall be lawyers actively practicing law in the state of Montana or members of the faculty of the law school of the university of Montana. The judges so selected shall include the president of the Montana judges' association and shall be from a list of suggested members submitted to the supreme court by the president of the Montana judges' association. The lawyers so selected shall include the president of the Montana bar association and shall be from a list of suggested members submitted to the supreme court by the president of the Montana bar association. The supreme court shall have the power to provide for terms of office, removals from office, filling of vacancies and changes in personnel of the commission.

History: En. Sec. 3, Ch. 255, L. 1959.

93-224. Proposed rules of pleading, practice and procedure—preparation—distribution. The commission so appointed shall prepare proposed rules of pleading, practice and procedure, and shall distribute copies to the

bench and bar of the state for their consideration and suggestions as they may submit to the commission.

History: En. Sec. 4, Ch. 255, L. 1959.

93-225. Tentative final draft of proposed rules—submission to supreme court. The commission shall within six (6) months after distribution of copies of the proposed rules submit the tentative final draft of proposed rules of civil procedure for Montana, to the supreme court for approval.

History: En. Sec. 5, Ch. 255, L. 1959.

93-226. Notice of hearing on tentative final draft—time for hearing. The submission of the tentative final draft to the supreme court will be noticed by the court by mailing notice of hearing to all district judges of the state and all attorneys licensed to practice in the Montana courts, as shown by the records of the clerk of the supreme court, and heard by it within ninety (90) days after submission by the commission, and all interested persons and organizations may appear that day by petition specifying their suggestions or objections thereon.

History: En. Sec. 6, Ch. 255, L. 1959.

93-227. Local rules of practice. Any district court and the supreme court, may adopt rules of court governing its practice so long as such rules are not in conflict with the rules promulgated by the supreme court of the state of Montana, and duly adopted by the legislature in accordance with this act, or with valid statutes of the state of Montana.

History: En. Sec. 7, Ch. 255, L. 1959.

93-228. Act not to affect powers of boards or commission in making rules governing their own practice. This act shall not affect the power of any constitutional or statutory commission or board to make rules governing its practice.

History: En. Sec. 8, Ch. 255, L. 1959.

93-229. Rules not effective until adopted by legislature. Any rules promulgated under this act shall be effective only upon adoption by the legislature.

History: En. Sec. 9, Ch. 255, L. 1959.

93-230. Changes, amendments and additional rules. The supreme court of this state shall have the right to suggest changes, amendments and additional rules of civil procedure of the state of Montana from time to time. Such changes, amendments, and additional rules shall be accomplished by the procedure as set out in this act.

History: En. Sec. 10, Ch. 255, L. 1959.

93-231. Employees of commission—employment of services of research agency. The said commission may from time to time employ a secretary-stenographer, as it deems necessary, to assist in its work, and shall fix the compensation of such secretary-stenographer. It shall further have the power to employ the services of any research agency which it deems necessary in the discharge of its duties.

History: En. Sec. 11, Ch. 255, L. 1959.

93-232. Expenses of members of commission. Members of said commission shall serve without compensation, but shall be reimbursed for actual travel and other expenses incurred in the discharge of their duties, including attendance at meetings.

History: En. Sec. 12, Ch. 255, L. 1959.

93-233. Officers—records—rules and regulations. The said commission shall from time to time elect one of its members as chairman, and may from time to time elect such other officers from among its membership as the commission may deem desirable. The commission is empowered to adopt rules for its own procedure, and to make all arrangements for its meetings, and to carry out the purpose for which it is created. The commission is directed to keep accurate records of its activities and proceedings.

History: En. Sec. 13, Ch. 255, L. 1959.

phrases may be declared unconstitutional or invalid."

Separability Clause

Section 14 of Ch. 255, Laws 1959 read "If any sentence, section, clause or phrase of this act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act. The legislative assembly of the state of Montana hereby declares that it would have passed this act irrespective of the fact that any one or more sections, sentences, clauses or

Repealing Clause

Section 15 of Ch. 255, Laws 1959 repealed all acts and parts of acts in conflict therewith.

Effective Date

Section 16 of Ch. 255, Laws 1959 provided the act should be in effect from and after its passage and approval. Approved March 13, 1959.

CHAPTER 3—DISTRICT COURTS

- | | |
|---------|---|
| Section | 93-302. Number of judges. |
| | 93-303. Salaries of district judges. |
| | 93-305. Expenses when sitting out of district, or attending judges' conference. |
| | 93-306. Audit of expense account. |
| | 93-314. Itemized statements—verification—filing. |
| | 93-315. Terms of court. |
| | 93-316. Adjournments—terms in districts of more than one county. |
| | 93-321. Terms and departments of court in districts having more than one judge. |

93-301. (8812) Judicial districts defined.

References

Cited in State ex rel. Bennett v. Bonner, 123 M 414, 214 P 2d 747; State v. Saginaw, 124 M 225, 220 P 2d 1021, 1024.

93-302. (8813) Number of judges. In each judicial district there must be the following number of judges of the district court, who must be elected by the qualified voters of the district, and whose term of office must be four (4) years, to wit: In the first, second, fourth, eighth, eleventh and sixteenth, two judges each, in the thirteenth, three judges, and, in all other districts, one judge each; and from and after the first Monday in January, 1961, there must be three judges in the eighth judicial district, which third judge in said judicial district shall be nominated and elected by the electors of said district in and at the 1960 primary and general elections.

Appointment and election of judge. That on or before July 1, 1957, the governor of this state shall designate and appoint a judge of the said eleventh judicial district who shall hold office until the general election

to be held during the year 1958, and until his successor is elected and qualified. The judge elected at the general election during the year 1958 shall hold office until his successor has been elected and qualified at the presidential general election to be held during the year 1960.

History: En. Sec. 1, p. 156, L. 1901; re-en. Sec. 6264, Rev. C. 1907; re-en. Sec. 8813, R. C. M. 1921; amd. Sec. 2, Ch. 91, L. 1929; amd. Sec. 1, Ch. 18, L. 1955; amd. Sec. 1, Ch. 91, L. 1957; amd. Sec. 1, Ch. 161, L. 1959.

Amendments

The 1955 amendment in the first paragraph deleted the word "thirteenth" from the list of districts having two judges each and inserted the words "in the thirteenth, three judges and," and added the second paragraph.

The 1957 amendment in the first paragraph added "eleventh" to the list of districts having two judges each and in the second paragraph inserted the words "and election" to the heading of said paragraph, substituted "eleventh" for "thirteenth," "general election to be held during the year 1958" for "next general election" and added the second sentence.

The 1959 amendment added to the first paragraph the final clause, providing for three judges for the eighth district.

Repealing Clauses

Section 2 of Ch. 18, Laws 1955; Sec. 2, of Ch. 91, Laws 1957 and Sec. 2 of Ch. 161, Laws 1959 repealed all acts and parts of acts in conflict therewith.

Effective Dates

Section 3 of Ch. 18, Laws 1955 provided the act should be in effect immediately upon its passage and approval. Approved February 11, 1955.

Section 3 of Ch. 91, Laws 1957 provided the act should be in effect immediately upon its passage and approval. Approved March 4, 1957.

References

Cited or applied in *Deich v. Deich*, — M —, 323 P 2d 35, 38.

93-303. (8814) Salaries of district judges. The annual salary of each district judge shall be ten thousand seven hundred dollars (\$10,700.00).

History: En. Sec. 1, Ch. 176, L. 1919; re-en. Sec. 8814, R. C. M. 1921; amd. Sec. 1, Ch. 114, L. 1947; amd. Sec. 1, Ch. 84, L. 1951; amd. Sec. 1, Ch. 247, L. 1955; amd. Sec. 1, Ch. 198, L. 1959; amd. Sec. 1, Ch. 187, L. 1961.

Compiler's Note

Section 2 of Ch. 187, Laws 1961, amended secs. 25-501 and 25-501.1.

Amendments

The 1951 amendment raised the salary from \$6,000 to \$7,500.

The 1955 amendment raised the salary from \$7,500 to \$9,000.

The 1959 amendment raised the salary from \$9,000 to \$9,500.

The 1961 amendment increased the salary from \$9,500 to \$10,700.

Repealing Clauses

Section 2 of Ch. 84, Laws 1951; Sec. 2 of Ch. 247, Laws 1955 and Sec. 2 of Ch. 198, Laws 1959 repealed all acts and parts of acts in conflict therewith.

Effective Dates

Section 3 of Ch. 84, Laws 1951 provided the act should be in effect from and after December 1, 1952.

Section 3 of Ch. 247, Laws 1955 provided the act should be in effect from and after its passage and approval. Approved March 11, 1955.

93-305. (8816) Expenses when sitting out of district, or attending judges' conference. Every judge who shall sit in the place of another judge in the trial or hearing of an action or proceeding in a district other than his own, or in the supreme court, or who shall attend a conference of judges in Helena called by the chief justice of the supreme court, shall be paid his actual expenses while engaged in that service as follows: His actual traveling expenses in going from the county seat which he makes his place of residence to the place of trial, or conference, and return, and his board and lodging while engaged in the trial, hearing, or conference.

History: En. Sec. 1, Ch. 3, L. 1907; Sec. 293, Rev. C. 1907; re-en. Sec. 8816, R. C. M. 1921; amd. Sec. 1, Ch. 15, L. 1953.

Amendment

The 1953 amendment added the provi-

sions in this section relating to a conference of judges.

Judges 22(10).

48 C.J.S. Judges § 36.

93-306. (8817) Audit of expense account. As soon as his services in connection with the trial or hearing are concluded, the judge shall certify in detail the amount of money necessarily and actually expended by him for his traveling expenses and board and lodging, as above specified, and shall file the claim with the state to be processed as provided by law.

History: En. Sec. 2, Ch. 3, L. 1907; Sec. 294, Rev. C. 1907; re-en. Sec. 8817, R. C. M. 1921; amd. Sec. 31, Ch. 97, L. 1961.

Amendment

The 1961 amendment at the end of the section substituted the words "with the state to be processed as provided by law" for the following: "for such services with the state board of examiners, who shall audit it, and if found correct by them, they shall transmit the claim to the state auditor, with their approval indorsed thereon, and the state auditor must draw his warrant for the amount so approved

in favor of the claimant, or his assigns, in the order in which the same was approved."

Repealing Clauses

Section 32 of Ch. 97, Laws 1961 read "Section 59-541 as enacted by section 5, chapter 66, Laws of 1955, and sections 82-1109, 82-1110, 82-1111, 82-1112, 82-1120, 46-1910 and 46-1911, Revised Codes of Montana, 1947, are repealed."

Section 33 of Ch. 97, Laws 1961 repealed all acts and parts of acts in conflict therewith.

93-309. (8820) Vacancies.

Retirement

Retirement of a district judge under the provisions of sections 68-101 to 68-1313

creates a vacancy which must be filled by the governor. State ex rel. Jardine v. Ford, 120 M 507, 188 P 2d 422, 425.

93-310. (8821) District courts by judges of other counties.

Authority of Judge

This section and section 93-2906 give a judge called in under the provisions of section 93-901 the authority to draw ad-

ditional jurors from jury box No. 3 for the remainder of the term under the provisions of section 93-1510. State v. Hay, 120 M 573, 194 P 2d 232, 234.

93-312. (8823) Governor may require judge to hold court, etc.

Authority of Governor

Where there is a duly qualified and acting judge in district governor is without power to order judges of other district into various counties of his district to assume judicial powers in such county. State ex rel. Bennett v. Bonner, 123 M 414, 214 P 2d 747.

This section does not empower the governor to exclude or remove from office the duly elected qualified and acting judge of

a judicial district. State ex rel. Bennett v. Bonner, 123 M 414, 214 P 2d 747.

Judge Declining to Perform Duties

If a judge declines to properly perform his official duties, relief must be had from the supreme court rather than from the executive power of the state. State ex rel. Bennett v. Bonner, 123 M 414, 214 P 2d 747.

93-314. (8825) Itemized statements—verification—filing. On the first of each month, or within three (3) days thereafter, such district judge, who may desire to avail himself of the provisions of this act, shall make out an itemized claim against the state of Montana, showing, with dates and particulars, all moneys by him, within the preceding month, paid out and expended for and on account of such expenses; and shall verify such claim by certifying that the items of the claim are true and correct, and are wholly unpaid, and that the expenditures therein enumerated were actually

and necessarily made in the discharge of official business while away from home. He shall then file such claim with the state to be processed as provided by law.

History: En. Sec. 2, Ch. 91, L. 1911; re-en. Sec. 8825, R. C. M. 1921; amd. Sec. 1, Ch. 67, L. 1951; amd. Sec. 10, Ch. 97, L. 1961.

Amendments

The 1951 amendment substituted "On the first of each month" for "Twice a year, on the first days of January and July of each year" and substituted "within the preceding month" for "within the last preceding six months."

The 1961 amendment, after the words "shall verify such claim by" in the first sentence, substituted "certifying" for

"making thereon or appending thereto his sworn affidavit"; and, at the end of the section, substituted "with the state to be processed as provided by law" for "with the clerk of the state board of examiners. At the first meeting of the board thereafter, the state board of examiners shall allow such claim, if properly verified, as above provided, and order a warrant drawn in payment thereof, and the state auditor shall thereupon, and in pursuance thereof, draw and issue a warrant of the state of Montana in payment of such claim, and forward the same to the claimant and take a receipt therefor."

93-315. (8826) Terms of court. The district court of each county which is a judicial district by itself has no terms, and must be always open for the transaction of business, except on legal holidays and non-judicial days. Juries for the trial of causes must be called by the judge as often as the public business requires. In each district where two or more counties are united the judge thereof must fix the term of court in each county in his district, and there must be at least four terms a year in each county. Any order of the judge of such district fixing terms of court shall be filed in the office of the clerk of the district court in each county of his district, and shall remain in effect until further order of the judge; provided, that nothing in this section shall be construed to prevent the calling of a special term of court, with or without a jury, when in the opinion of the presiding judge the same is necessary. The district judge may adjourn a term of district court in one county to a future day certain, and in the meantime hold court in another county.

History: En. Sec. 38, C. Civ. Proc. 1895; amd. Sec. 1, p. 156, L. 1901; Sec. 6272, Rev. C. 1907; re-en. Sec. 8826, R. C. M. 1921, amd. Sec. 1, Ch. 144, L. 1959. Cal. C. Civ. Proc. Sec. 73.

Amendment

The 1959 amendment substituted "by the judge as often as the public business requires" for "on the first Monday of every alternate month, if the judge so directs, and oftener if the public business requires" at the end of the second sentence; deleted the words "which must be held at the county seat" which followed "county in his district" in the third sentence; and substituted the portion of the fourth sentence preceding the proviso for "The judge of such district court must, within ten days after the first day of December of each year, make an order which must designate the times at which the terms of court are to be held in each county in his district in the coming year, beginning with the first day of January following such order, and must cause such

order, or a copy thereof, to be filed in the office of the clerk of the district court in each county in his district, and such clerk must cause the same to be published in some newspaper printed in his county for three successive weeks immediately after the filing of such order, the costs of which shall be a county charge, and no change of time of holding the terms of court so fixed in any county must be made during the year."

Terms—Effect on Grand Jury

Although district court is always open and each term continues until the succeeding term, the terms as fixed by the court limit the existence of the grand jury, the beginning of each term constituting a "final adjournment" of the preceding term within the meaning of section 94-6314. *State ex rel. Adami v. Lewis and Clark County*, 124 M 282, 220 P 2d 1052.

References

Cited in *State v. Saginaw*, 124 M 225, 220 P 2d 1021, 1024.

93-316. (8827) Adjournments—terms in districts of more than one county. Adjournments from day to day, or from time to time, are to be construed as recesses in the session or term, and shall not prevent the court from sitting at any time. In districts where two or more counties are united, court may be held, causes tried, with or without a jury, and business transacted in any and all of the counties of the district continuously and simultaneously, with or without recesses, and without regard to the beginning or ending of any of the terms in any of the counties of the district. The judge of such district may hold court in one county of such district, try causes, with or without a jury, and transact business, while at the same time court may be held, causes tried, with or without a jury, and business transacted in any other county of such district by the same judge or by any other district judge of the state, when requested or assigned thereto under any of the provisions of the code or statutes of Montana.

History: Ap. p. Sec. 39, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 184, L. 1907; Sec. 6273, Rev. C. 1907; re-en. Sec. 8827, R. C. M. 1921; amd. Sec. 2, Ch. 144, L. 1959.

Amendment

The 1959 amendment substituted the latter part of the second sentence, beginning with "any and all of the counties" for "any county from the beginning of the term to the beginning of the next term in the same county, notwithstanding the time or term fixed for holding said district court in another county in the same dis-

trict, to the same extent and effect, and with like power as if there were no other term of court held or fixed in such other county"; inserted the words "by the same judge or" in the latter part of the third sentence; and, at the end of the section, substituted "under any of the provisions of the code or statutes of Montana" for "as provided in section 93-310."

Repealing Clause

Section 3 of Ch. 144, Laws 1959 repealed all acts or parts of acts in conflict therewith.

93-318. (8829) Original jurisdiction.

Aggregation of Causes of Action

Held, that where there are several causes of action, each for less than the jurisdictional minimum for the district court, they may be prosecuted in the district court where their aggregate exceeds the jurisdictional minimum. *Stokke v. Graham*, 129 M 96, 281 P 2d 1025, 1026. See, however,

the concurring opinions, 129 M 96, 281 P 2d 1025, 1027.

References

Cited in *Benson v. Benson*, 121 M 439, 193 P 2d 827, 829; *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 765.

93-320. (8831) Process.

References

Cited or applied in *Fraser v. Clark*, 128 M 160, 273 P 2d 105, 114.

93-321. (8832) Terms and departments of court in districts having more than one judge. In each judicial district which has now or may hereafter have more than one judge, as many terms or sessions of court may be held at the same time as there are judges in the district, either elected or appointed to, called into, or assigned to the performance of the duties of holding court therein. The judges elected or appointed to hold office in each judicial district, having more than one judge, must divide the court into departments, prescribe the order of business, and make rules for the government of such court. Each department shall be numbered and each judge shall be assigned to one (1) of such numbered departments. The judges must apportion the business of the court among

themselves as equally as may be, but in case of their failure to make such apportionment for any cause, or in case of their failure for any cause to assign each judge to a numbered department, the supreme court, upon application of any interested person, shall make an order apportioning such business and assigning each judge to a numbered department, and cause the same to be entered upon the minute book of the district court in each county in such district, and such order shall remain in full force and effect until modified or repealed by the authority making it. The failure or refusal of any district judge to carry out the terms of such order shall constitute a contempt of the supreme court.

History: En. Sec. 44, C. Civ. Proc. 1895; re-en. Sec. 6278, Rev. C. 1907; amd. Sec. 1, Ch. 7, L. 1915; re-en. Sec. 8832, R. C. M. 1921; amd. Sec. 1, Ch. 229, L. 1961.

Compiler's Note

Sections 2 to 4, Ch. 229, Laws 1961, amended secs. 23-2001, 23-2003, and 23-2005.

Amendment

The 1961 amendment inserted the third sentence; substituted "The judges" for "They" at the beginning of the fourth sentence; and inserted the phrases "or in case of their failure for any cause to assign each judge to a numbered department" and "and assigning each judge to a numbered department" in the fourth sentence.

Operation and Effect

Where a criminal case was assigned an

odd number and under the rules in force under this section for the district court of the first judicial district, all civil and criminal cases bearing an odd number shall be assigned to department one of said court, it was not within the authority of the judge of department two to rule on a motion to suppress certain evidence and such proceedings under department two were void. *State ex rel. Magnuson v. District Court*, 125 M 79, 231 P 2d 941, 942, 944.

Where judge of the second department assumed jurisdiction of a divorce suit, even though, under the rules, it was properly assignable to the first department, it was beyond the power of the judge of the first department to interfere in any way and proceedings wherein he set aside the divorce were null and void. *Deich v. Deich*, — M —, 323 P 2d 35, 40.

CHAPTER 4—JUSTICES' AND POLICE COURTS

93-402. (8834) Courts—where held—when open for business.

False Imprisonment Action Against Sheriff

In an action for false imprisonment brought against a sheriff and the surety on his official bond based on alleged delay in bringing plaintiff before a magistrate, it

was essential that the plaintiff prove that a magistrate was available on the particular day when the false imprisonment allegedly occurred. *Rounds v. Bucher*, — M —, 349 P 2d 1026.

CHAPTER 5—GENERAL PROVISIONS RESPECTING THE POWERS, PROCEEDINGS AND HOLDING OF COURTS OF JUSTICE

93-502. (8845) Courts of record may make rules.

References

Cited or applied in *State ex rel. Kennedy v. District Court*, 121 M 320, 194 P 2d 256, 259, 2 ALR 2d 1050; *State ex rel. Ben-*

nett v. Bonner, 123 M 414, 214 P 2d 747; *Sullivan v. Board of County Comrs.*, 124 M 364, 224 P 2d 135, 137.

93-503. (8846) When rules take effect.

Manner of Publication

Publication may be accomplished by announcement in open court. In *re Dalton's*

Guardianship, — M —, 354 P 2d 1048, 1052.

93-506. (8849) Days on which courts, etc., may be held.**Cross-Reference**

See note to sec. 93-507. *Miller v. Emerson*, 120 M 380, 186 P 2d 220.

93-507. (8850) Nonjudicial days.**Failure to Object to Proceedings**

By failure to interpose timely objection or by consenting to proceed with the case

a party waives his right to object to proceedings conducted on a holiday. *Miller v. Emerson*, 120 M 380, 186 P 2d 220, 222.

CHAPTER 9—DISQUALIFICATION OF JUDICIAL OFFICERS

Section 93-901. Cases in which judge may be disqualified—calling in another judge.

93-901. (8868) Cases in which judge may be disqualified—calling in another judge. Any justice, judge, or justice of the peace must not sit or act as such in any action or proceeding:

1. To which he is a party, or in which he is interested;
2. When he is related to either party by consanguinity or affinity within the sixth degree, computed according to the rules of law;
3. When he has been attorney or counsel for either party in the action or proceeding, or when he rendered or made the judgment, order, or decision appealed from;

4. When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge. Such affidavit may be made by any party to an action, motion, or proceeding, personally, or by his attorney or agent, and shall be filed with the clerk of the district court in which the same may be pending. In any judicial district having only one judge the affidavit of disqualification with reference to any action or proceeding to be tried before a jury must be filed at least one day before the day appointed or fixed by the court for setting the trial calendar; provided, however, this limitation shall not apply unless notice of such setting date shall be given to all parties by the clerk of the district court at least fifteen (15) days prior thereto. In all other cases the affidavit must be filed at least five days before the day appointed or fixed for the hearing or trial of any such action, motion, or proceeding (provided such party shall have had notice of the hearing of such action, motion, or proceeding for at least the period of five days and in case he shall not have had notice for such length of time, he shall file such affidavit immediately upon receiving such notice). Upon the filing of the affidavit, the judge as to whom said disqualification is averred shall be without authority to act further in the action, motion, or proceeding, but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the action or proceeding to some other court, nor to the power of calling in another district judge to sit and act in such action or proceeding, providing that no judge shall so arrange the calendar as to defeat the purposes of this section. No more than two judges can be disqualified for bias or prejudice, in said action or proceeding, at the instance of the plaintiff, and no more

than two at the instance of the defendant, in said action or proceeding, and this limitation shall apply however many parties or persons in interest may be plaintiffs or defendants in such action or proceeding. If there be more than one judge in any judicial district in which said affidavit is made and filed, upon the first disqualification of a judge in the cause, another judge, residing in the judicial district wherein the affidavit is made and filed, must be called in to preside in such action, motion, or proceeding; and upon the second or any subsequent disqualification of a judge in the cause, a district judge of another judicial district of the state must be called in to preside in such action, motion, or proceeding, or the action, motion, or proceeding transferred to a district judge of another judicial district of the state; when another judge has assumed jurisdiction of an action, motion, or proceeding, the clerk of the district court in which the same was pending, shall at once notify the parties or their attorneys of record in the same, either personally or by registered mail, of the name of the judge called in, or to whom such action, motion, or proceeding was transferred. Such second or subsequent affidavit of disqualification shall be filed with the clerk of the district court in which such action, motion or proceeding may be pending within three days after the party or his attorney of record, filing such affidavit, has received notice as to the judge assuming jurisdiction of such action, motion, or proceeding.

History: Ap. p. Sec. 453, p. 134, Ban-nack Stat.; re-en. Sec. 610, p. 159, Cod. Stat. 1871; re-en. Sec. 530, p. 179, L. 1877; re-en. Sec. 530, 1st Div. Rev. Stat. 1879; re-en. Sec. 547, 1st Div. Comp. Stat. 1887; amd. Sec. 180, C. Civ. Proc. 1895; amd. Ch. 3, 2nd Ex. L. 1903; re-en. Sec. 6315, Rev. C. 1907; amd. Sec. 1, Ch. 114, L. 1909; re-en. Sec. 8868, R. C. M. 1921; amd. Sec. 1, Ch. 93, L. 1927; amd. Sec. 1, Ch. 218, L. 1961. Cal. C. Civ. Proc. Sec. 170.

Amendment

The 1961 amendment divided the former second sentence of subd. 4 into the present second and fourth sentences; inserted the third sentence of subd. 4; and inserted the words "In all other cases the affidavit must be filed" at the beginning of the present fourth sentence of subd. 4.

Repealing Clause

Section 2 of Ch. 218, Laws 1961 repealed all acts and parts of acts in conflict therewith.

Cross-Reference

Disqualification of judge in criminal proceedings, sec. 94-6913.

Affidavit of Disqualification by Attorney

When an attorney makes the affidavit of disqualification for bias he should make it on his own belief that his client cannot have a fair trial. *State ex rel. Coleman v. District Court*, 120 M 372, 186 P 2d 91, 93.

Application of Section

The provisions of subd. 4 of this section apply not only to ordinary law suits but to any "action, motion or proceeding" including proceedings for the establishment of an irrigation district. *In re Woodside-Florence Irr. Dist.*, 121 M 346, 194 P 2d 241, 256.

Where a judge in a probate proceeding is disqualified for imputed bias and prejudice under this section, the procedure for calling in another judge is under this section and not under section 91-2001 which has no application when the disqualification is for imputed bias and prejudice. *State ex rel. O'Sullivan v. District Court*, 127 M 32, 256 P 2d 1076, 1078.

Authority of Called Judge

A judge called in under the provisions of this section has the right under the provisions of section 93-1510 to draw additional jurors from jury box No. 3 to serve for the remainder of the term. *State v. Hay*, 120 M 573, 194 P 2d 232, 234.

Where the regularly presiding judge was disqualified and thereafter the second judge was disqualified, the regular presiding judge had the power to arrange the calendar and call in another judge. *Fuller v. Gibbs*, 122 M 177, 199 P 2d 851, 855.

Change of Venue

The district judge's compliance with this section is a condition precedent to obtaining a change of venue under section 93-2906. *State ex rel. Coleman v. District Court*, 120 M 372, 186 P 2d 91, 94.

Disqualified Judge

Where, during the course of a divorce proceeding a judge is disqualified and another judge assumes jurisdiction and commits the husband to jail for contempt, on a habeas corpus petition brought by the jailed husband the disqualified judge would not be authorized to act and a writ of prohibition will lie to prohibit such judge from proceeding further in the habeas corpus matter. *State v. District Court of Lewis and Clark County*, 130 M 73, 295 P. 2d 233.

Filing of Affidavit—Effect

The mere filing of the affidavit ipso facto works the disqualification of the judge against whom it is directed. In *re Woodside-Florence Irr. Dist.*, 121 M 346, 194 P 2d 241, 244.

The mere filing of such affidavit ipso facto worked the disqualification of the judge against whom it was directed and except as is expressly provided in and allowed by the provisions of subdivision 4 of section 93-901, all orders in the cause made by the judge subsequent to the filing of the affidavit of disqualification against said judge are set aside, vacated and held for naught as null and void for want of jurisdiction. *State ex rel. McVay v. District Court*, 126 M 382, 251 P 2d 840, 849.

In habeas corpus proceedings relating to custody of children under divorce decree where judge assumed jurisdiction on October 28, father's affidavit for disqualification of judge was timely filed on October 31 depriving judge of jurisdiction in the case and judgment rendered by him thereafter was null and void. *Mead v. Mead*, 134 M 391, 332 P 2d 499, 500.

Grounds for Disqualification

The fact that the judge had previously heard some criminal matter against the person who was acting as the agent of the defendant but who was not a party to the action himself was not a ground for disqualification. *Gibbs v. Fuller*, 120 M 516, 188 P 2d 426, 428.

Juvenile Delinquency Proceedings

From a reading of the statutes governing juvenile matters it is apparent that the legislative intent is that juvenile matters and proceedings are to be treated as civil and not as criminal proceedings and therefore the provisions of this section relating to the disqualification of judges applies to juvenile delinquency proceedings. *State ex rel. Ostoj v. McClernan*, 129 M 160, 284 P 2d 252, 254.

Mandamus

In action for mandamus to require district judge to call in another judge after affidavit of disqualification, judge cannot

defend that the relatrix had not consented to the filing of the affidavit nor to the institution of the mandamus proceeding, where no attempt was made to raise such question under section 93-2121. *State ex rel. Coleman v. District Court*, 120 M 372, 186 P 2d 91, 93.

Number of Disqualifications

Where plaintiff had already disqualified two judges, he had no right to disqualify another judge for bias or prejudice. *Gibbs v. Fuller*, 120 M 516, 188 P 2d 426, 428.

Where judgment was obtained in action to quiet title, a subsequent proceeding for a writ of possession was a proceeding in the same action for the enforcement of the judgment and therefore when two judges had been disqualified for bias or prejudice in the original proceeding an attempted disqualification of another judge by the defendant in the proceeding for writ of possession was of no effect. *Fuller v. Gibbs*, 122 M 177, 199 P 2d 851, 853.

Operation and Effect

This section and section 93-2906 are companion sections and must be construed together. *State ex rel. Coleman v. District Court*, 120 M 372, 186 P 2d 91, 94.

The disqualification provided for in subd. 4 of this section stands upon the same level of importance as do those provided for in the preceding three subdivisions, except as to the time when the imputation may be made, and operates as effectively if invoked at the proper time. In *re Woodside-Florence Irr. Dist.*, 121 M 346, 194 P 2d 241, 245.

Probate Proceedings

The word "proceeding" used in this section applies to a probate proceeding, thus permitting the disqualification of judges therein for imputed bias. *State ex rel. Reid v. District Court*, 126 M 586, 256 P 2d 546, 550.

A proceeding for the administration of an estate of a deceased person advances step by step through various stages of the proceeding and involves successive determinations in the course of such proceeding. The term "proceeding" is used in the Probate Code as a general designation of the entire judicial procedure employed whereby the law is administered upon the various subjects within the probate jurisdiction. *State ex rel. Reid v. District Court*, 126 M 586, 256 P 2d 546, 549, 550.

Where appellant filed a petition for letters of special administration and for probate of a will, which will was contested and during which appellant disqualified one judge for bias, and subsequent to the first petition, other parties filed a petition for letters of administration and appellant disqualified one judge for bias from hearing such petition, the appellant could not

disqualify another judge from hearing the second petition since he had already disqualified the maximum of two judges as allowed by this section. State ex rel. Reid v. District Court, 126 M 586, 256 P 2d 546. (See, however, dissenting opinions of Justices Angstman and Anderson in 126 M 586, 256 P 2d 546 at pages 551 and 552 respectively.)

Proof of Alleged Bias and Prejudice Is Neither Required Nor Permitted

No inquiry as to the truth or falsity of the assertion of bias or prejudice can be permitted. State ex rel. Coleman v. District Court, 120 M 372, 186 P 2d 91, 93.

Time for Calling in New Judge

While a district judge against whom an affidavit of disqualification for implied bias has been filed may take the time reasonably necessary to ascertain what other judge or judges may be available to preside in the case, he must proceed in good faith and without unreasonable delay to call another judge. State ex rel. Coleman v. District Court, 120 M 372, 186 P 2d 91, 93.

A judge against whom an affidavit of disqualification has been filed ought not to be permitted to delay for ten months the calling in of another judge to sit in the case simply because he has not sooner been able to find a district judge who will accept such jurisdiction in conformity with the rules of his court. State ex rel. Coleman v. District Court, 120 M 372, 186 P 2d 91, 94.

When district judge fails to call in another judge within a reasonable time after the filing of an affidavit of bias, mandamus is the proper remedy. State ex rel. Coleman v. District Court, 120 M 372, 186 P 2d 91, 94.

Time for Disqualification

A judge who has been called in and assumed jurisdiction of a case could be disqualified to hear a separate proceeding therein, long after he had actually exercised jurisdiction on other matters in the case. McLeod v. McLeod, 126 M 32, 243 P 2d 321. (This case rests upon Sullivan v. District Court, 122 M 1, 196 P 2d 452, overruled by 284 P 2d 1005, inasmuch as the Sullivan case by necessary implication overrules any contrary conclusion of Stefoniak v. District Court, 117 M 86, 157 P 2d 96.)

Where the judge in issuing a writ of prohibition set November 21, 1950 as the return date and defendant filed a demurrer, which was disposed of and then an answer to which plaintiff filed a reply so that the trial actually took place on April 25, 1951 upon the issues framed by the pleadings, an affidavit of disqualification of the judge for imputed bias and

prejudice filed April 13, 1951 was timely. The return date stated in the writ of prohibition (November 21, 1950) was not the "day appointed or fixed for the hearing or trial" within the meaning of this section. Esterby v. Justice Court of Hellgate Township, 127 M 1, 256 P 2d 544.

Trial Date Fixed by Disqualified Judge

A judge though disqualified may still arrange the calendar and where hearing date was fixed by disqualified judge and subsequent notice that another judge had accepted jurisdiction was tantamount to a notice that the trial would proceed on the date fixed where no different date was arranged for. Gibbs v. Fuller, 120 M 516, 188 P 2d 426, 428.

When Affidavit Must Be Filed

Where notice of intention to move for a new trial was to be based on the minutes of court and affidavits to be filed and no affidavits were filed and no additional time for filing was obtained from the court, the moving parties had only ten additional days after the ten day period for filing affidavits in which to have the motion heard, and an affidavit of disqualification of the judge, filed less than five days before the last day for hearing the motion, came too late. State v. District Court, 131 M 404, 310 P 2d 1055, 1056.

Withdrawal of Affidavit

Upon the filing of the affidavit of disqualification, jurisdiction over the cause is lost, and disqualification cannot thereafter be waived by a withdrawal of the affidavit over the protests and objections of the opposite party. In re Woodside-Florence Irr. Dist., 121 M 346, 194 P 2d 241, 245.

The fact that the supreme court was not in session at the time the affidavit of disqualification was filed is no ground for permitting the withdrawal of the affidavit and proceeding with the same judge over the objection of the opposite party. In re Woodside-Florence Irr. Dist., 121 M 346, 194 P 2d 241, 256.

Writ of Prohibition

Relators in application for a writ of prohibition, were not joined as parties defendant in the original proceeding, therefore were not served with notice of the date and place of hearing. They were joined as parties defendant by order of the court at the hearing; and immediately filed affidavit of disqualification required by this section. Upon the filing of the affidavit the judge against whom it was directed was without authority to further act in the proceedings. State ex rel. Montana State University v. District Court, 132 M 262, 317 P 2d 309, 314.

References

Cited or applied in *State ex rel. Kennedy v. District Court*, 121 M 320, 194 P 2d 256, 263, 2 ALR 2d 1050; *State ex rel. Bennett v. Bonner*, 123 M 414, 214 P 2d 747; *State ex rel. Gilreath v. District Court*, 127 M 431, 265 P 2d 651, 653 (dissenting opinion); *State ex rel. Haegg v. District Court*, 130 M 530, 304 P 2d 1116, 1117.

Interest of judge in an official or representative capacity as disqualification. 10 ALR 2d 1307.

Power of successor judge taking office during term time to vacate, etc., judgment entered by his predecessor. 11 ALR 2d 1117.

CHAPTER 11—MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS

93-1101. (8877) Subsequent applications for orders refused, etc.

References

Cited in *State ex rel. McVay v. District Court*, 126 M 382, 251 P 2d 840, 848.

93-1106. (8882) Means to carry jurisdiction into effect.

References

Cited or applied in *State v. Rother*, 130

M 357, 303 P 2d 393, at 411 (dissenting opinion).

CHAPTER 13—JURORS—QUALIFICATIONS AND EXEMPTIONS

93-1301. (8890) Who competent to act as juror.

References

Cited or applied in *State v. Deeds*, 130 M 503, 305 P 2d 321, 323.

93-1305. (8894) Who may be excused.

References

Cited or applied in *State v. Hay*, 120 M 573, 194 P 2d 232, 235.

Exclusion of attorneys from jury list in criminal cases. 32 ALR 2d 890.

CHAPTER 14—JURORS—SELECTION AND RETURN

Section 93-1401. Jury lists, by whom and when to be made.

93-1402. Selection of persons qualified to serve as trial jurors.

93-1404. Duty of clerk—jury boxes.

93-1401. (8896) Jury lists, by whom and when to be made. The chairman of the county commissioners, or in his absence, any member of the board of county commissioners, the county treasurer, and the county assessor, or any two of such officers, of each county must meet at the county seat of each county at the office of the county clerk on the second Monday of December of each year, for the purpose of making a list of persons to serve as trial jurors for the ensuing year. If they fail to meet on the day specified in this section, they must meet as soon thereafter as practicable. The first meeting of such officers for the purpose of making such list is within ten [10] days after this code takes effect.

History: En. Sec. 240, C. Civ. Proc. 1895; re-en. Sec. 6342, Rev. C. 1907; re-en. Sec. 8896, R. C. M. 1921; amd. Sec. 1, Ch. 133, L. 1949; amd. Sec. 1, Ch. 86, L. 1959. Cal. C. Civ. Proc. Sec. 204.

Amendments

The 1949 amendment inserted the words "or in his absence, any member of the board of county commissioners" and the words "or any two of such officers."

The 1959 amendment substituted "December" for "January" in this section.

Repealing Clauses

Section 2 of Ch. 133, Laws 1949 and Sec. 2 of Ch. 86, Laws 1959 repealed all acts and parts of acts in conflict therewith.

Effective Date

Section 3 of Ch. 133, L. 1949 provided the act should be in effect from and after its passage and approval. Approved March 1, 1949.

References

Cited in *State v. Hay*, 120 M 573, 194 P 2d 232, 235; *State v. Deeds*, 130 M 503, 305 P 2d 321, 323.

93-1402. (8897) Selection of persons qualified to serve as trial jurors.

At the meeting, specified in the last section, the officers present must select, from the last assessment roll of the county, and make a list of the names of all persons qualified to serve as trial jurors, as prescribed in the last chapter. Each name so appearing on said list shall be assigned a number which shall be placed opposite the name on the jury list and shall be considered the number of the juror opposite whose name it appears. Said numbers shall be consecutive from "1" to the total number of jurors.

History: En. Sec. 241, C. Civ. Proc. 1895; re-en. Sec. 6343, Rev. C. 1907; amd. Sec. 1, Ch. 80, L. 1919; re-en. Sec. 8897, R. C. M. 1921; amd. Sec. 1, Ch. 168, L. 1957.

References

Cited in *State v. Hay*, 120 M 573, 194 P 2d 232, 235; *State v. Deeds*, 130 M 503, 305 P 2d 321, 323.

Amendment

The 1957 amendment added the second and third sentences.

93-1403. (8898) Lists delivered to clerk.

References

Cited in *State v. Hay*, 120 M 573, 194 P 2d 232, 235.

93-1404. (8899) Duty of clerk—jury boxes. The clerk shall prepare and keep a jury box and contents as follows: The number of each juror shall be written, typed or stamped on paper or other suitable material, and enclosed in separate black capsules, identical in all respects, and placed in a box of ample size to permit said capsules to be thoroughly mixed, and which said box shall be kept for that purpose and shall be known as, and plainly marked, "jury box No. 1." Said capsules may be used as often as necessary; provided, however, no capsule shall be used which is in any manner whatsoever defaced or disfigured, or so marked that it may be recognized or distinguished from the other capsules in said jury box No. 1. There shall be so enclosed in said box one number, and only one number, corresponding to the name of each juror on the jury list.

History: En. Sec. 243, C. Civ. Proc. 1895; re-en. Sec. 6345, Rev. C. 1907; amd. Sec. 1, Ch. 35, L. 1919; re-en. Sec. 8899, R. C. M. 1921; amd. Sec. 2, Ch. 168, L. 1957. Cal. C. Civ. Proc. Sec. 209.

Amendment

The 1957 amendment substituted the words "The clerk shall prepare and keep a jury box and contents as follows: The number of each juror shall be written, typed or stamped on paper or other suitable material, and enclosed in separate black capsules, identical in all respects,

and placed" for the words "Immediately after the list has been delivered to him, the clerk must prepare suitable ballots, by writing the name of each person so selected, as contained in the list, with his place of residence and other additions, on a separate piece of paper. The ballots must be uniform, as nearly as may be, in appearance, and each ballot must thereafter be inserted in a black capsule, and when all the said ballots have been so inserted, the clerk must deposit them" and added the third sentence.

Use of Capsules

Where a jury venire was drawn from a jury box in which there had been inserted approximately 30,000 numbers enclosed in separate black capsules and approximately 15,000 numbered slips of unfolded paper not enclosed in capsules, it was proper to issue a writ of prohibition restraining the judge from calling civil and criminal cases

to be tried before the jury venire. State ex rel. Henningsen v. District Court, — M —, 348 P 2d 143.

References

Cited in State v. Hay, 120 M 573, 194 P 2d 232, 235; State v. Porter, 125 M 503, 242 P 2d 984, 986; State v. Deeds, 130 M 503, 305 P 2d 321, 325.

93-1405. (8900) Repealed.**Repeal.**

This section (Sec. 244, C. Civ. Proc. 1895), relating to the ballot box and re-

maining ballots, was repealed by Sec. 10, Ch. 168, Laws 1957, effective January 1, 1958.

93-1406. (8901) Term of service of jurors.**Cross-Reference**

See note to sec. 93-1504. State v. Allison, 122 M 120, 199 P 2d 279.

References

Cited in State ex rel. Adami v. Lewis and Clark County, 124 M 282, 220 P 2d 1052, 1055.

CHAPTER 15—JURORS—DRAWING AND SUMMONING FOR COURTS OF RECORD

- Section 93-1501. Summoning of trial jury.
 93-1502. District judge to draw jury.
 93-1503. Drawing—how conducted.
 93-1504. Jury box No. 2.
 93-1505. Jurors—when to be drawn from jury box No. 2.
 93-1506. Jury box No. 3.
 93-1509. Sheriff to summon jurors, how.
 93-1510. Jurors drawn from jury box No. 3, when.
 93-1511. Summoning jurors to complete a panel.

93-1501. (8902) Summoning of trial jury. At least once each year in each county, when a civil or criminal case has been at issue and ready for trial for more than six (6) months and the plaintiff or defendant in such case has requested a jury trial or whenever the business of a district court requires the attendance of a trial jury for the trial of civil or criminal cases, and no jury is in attendance, the court must make an order directing a trial jury to be drawn and summoned to attend before said court. Such order must specify the number of jurors to be drawn, and the time at which the jurors are required to attend, which time may be at the same term in which the jurors are drawn, or at the next succeeding term, in the discretion of the court. And the court may direct that such causes, either criminal or civil, in which a jury may be required, or in which a jury may have been demanded, be continued and fixed for trial when a jury shall be in attendance.

History: En. Sec. 260, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 7, L. 1907; Sec. 6348, Rev. C. 1907; re-en. Sec. 8902, R. C. M. 1921; amd. Sec. 1, Ch. 62, L. 1949. Cal. C. Civ. Proc. Sec. 214.

months and the plaintiff or defendant in such case has requested a jury trial or" and substituted the word "must" for "may" between the words "the court" and "make an order directing a trial jury."

Amendment

The 1949 amendment inserted the first part of this section reading "At least once each year in each county, when a civil or criminal case has been at issue and ready for trial for more than six (6)

Repealing Clauses

Section 2 of Ch. 62, L. 1949 repealed Chapter 277 of the Montana Session Laws of 1947 (secs. 93-4912 to 93-4915, Revised Codes 1947).

Section 3 of Ch. 62, L. 1949 repealed all acts and parts of acts in conflict therewith.

Cross-Reference

See note to sec. 93-1510. *State v. Hay*, 120 M 573, 194 P 2d 232, 235.

93-1502. (8903) **District judge to draw jury.** Immediately upon the order mentioned in the preceding section having been made the district judge shall in the presence of the clerk of the court proceed to draw the jurors by number from jury box No. 1.

History: En. Sec. 261, C. Civ. Proc. 1895; re-en. Sec. 6349, Rev. C. 1907; re-en. Sec. 8903, R. C. M. 1921; amd. Sec. 1, Ch. 151, L. 1937; amd. Sec. 1, Ch. 3, L. 1939; amd. Sec. 3, Ch. 168, L. 1957. Cal. C. Civ. Proc. Sec. 215.

Amendment

The 1957 amendment inserted the words "by number."

References

Cited or applied in *State v. Porter*, 125 M 503, 242 P 2d 984, 986; *State v. Deeds*, 130 M 503, 305 P 2d 321, 325.

93-1503. (8904) **Drawing—how conducted.** 1. The clerk must place said box on a rod so that the same may readily revolve and said box must be revolved a sufficient number of times so as to insure that the capsules in said box shall become thoroughly mixed, and thereafter the judge must draw from said box one at a time, as many of said capsules containing the numbers of jurors as are ordered by the court.

2. A minute of the drawing shall be entered in the minutes of the court, which must show the names of the jurors corresponding to the numbers so drawn from said jury box.

3. If the name of any person so drawn is deceased or insane, or who may have permanently removed from the county, and the fact shall be made to appear to the satisfaction of the court, the name of such person shall be omitted from the list, and another juror drawn in his place, and the fact shall be entered upon the minutes of the court. The same proceeding shall be had as often as may be necessary, until the number of jurors required shall have been drawn. After the drawing shall have been completed, the clerk shall make a copy of the list of names of the persons so drawn, and certify the same. In his certificate he shall state the date of the order and of the drawing, and the number of the jurors drawn, and the time when and the place where such jurors shall be required to appear. Such certificate and list shall be delivered to the sheriff for service.

History: En. Sec. 262, C. Civ. Proc. 1895; re-en. Sec. 6350, Rev. C. 1907; amd. Sec. 2, Ch. 35, L. 1919; re-en. Sec. 8904, R. C. M. 1921; amd. Sec. 1, Ch. 148, L. 1933; amd. Sec. 2, Ch. 151, L. 1937; amd. Sec. 2, Ch. 3, L. 1939; amd. Sec. 4, Ch. 168, L. 1957. Cal. C. Civ. Proc. Sec. 219.

Amendment

The 1957 amendment in subd. 1 substituted the word "numbers" for the word "names"; in subd. 2 substituted "names of the jurors corresponding to the numbers" for "name on each slip of paper" and in

subd. 3 substituted the present first sentence for one which read "If the name of any person is drawn from said box who is deceased or insane, or who may have permanently removed from the county, or who is exempt from jury service, and the fact shall be made to appear to the satisfaction of the court, the name of such person shall be omitted from the list, and the slip of paper having such name on it shall be destroyed and another juror drawn in his place, and the fact shall be entered upon the minutes of the court."

Use of Capsules

Where a jury venire was drawn from a jury box in which there had been inserted approximately 30,000 numbers enclosed in separate black capsules and approximately 15,000 numbered slips of un-

folded paper not enclosed in capsules, it was proper to issue a writ of prohibition restraining the judge from calling civil and criminal cases to be tried before the jury venire. *State ex rel. Henningsen v. District Court*, — M —, 348 P 2d 143.

93-1504. (8905) Jury box No. 2. After the adjournment of the term or session at which trial jurors have been returned, as prescribed in the last section, the clerk must deposit the capsules containing the numbers of the jurors who attended and served, in another box kept by him, known as and marked "jury box No. 2." The capsules containing the ballots with the numbers of those who did not appear and serve must be returned to the box from which they were taken.

History: En. Sec. 263, C. Civ. Proc. 1895; re-en. Sec. 6351, Rev. C. 1907; amd. Sec. 3, Ch. 35, L. 1919; re-en. Sec. 8905, R. C. M. 1921; amd. Sec. 5, Ch. 168, L. 1957.

Amendment

The 1957 amendment in the first sentence substituted the words "numbers of the jurors" for the words "ballots with the names of those"; in the second sentence substituted "numbers" for "names" and deleted the words "which have not been

destroyed as prescribed in the preceding section" which appeared between the words "serve" and "must."

Jurors Called But Not Serving

Where a panel of 89 persons was called and sworn as jurors for the term but were discharged before serving at any trial, such jurors had not served within the meaning of this section and it was proper to return such names to jury box No. 1 and not jury box No. 2. *State v. Allison*, 122 M 120, 199 P 2d 279, 284.

93-1505. (8906) Jurors—when to be drawn from jury box No. 2. If, at the time of drawing trial jurors for a term or session, there is not a sufficient number of capsules containing the numbers of jurors thereon remaining in box No. 1, the judge presiding, after drawing all the capsules containing therein the numbers of the jurors, must draw the necessary number from box No. 2, containing the numbers of those jurors who have before served, as prescribed in the last section; and must continue to draw from that box until new lists of jurors are provided.

History: En. Sec. 264, C. Civ. Proc. 1895; re-en. Sec. 6352, Rev. C. 1907; amd. Sec. 4, Ch. 35, L. 1919; re-en. Sec. 8906, R. C. M. 1921; amd. Sec. 2, Ch. 148, L. 1933; amd. Sec. 6, Ch. 168, L. 1957.

Amendment

The 1957 amendment substituted "the

numbers of jurors" "the numbers of the jurors" and "the numbers of those jurors" for "ballots with the names of jurors" "ballots with the names of jurors thereon" and "the names of those jurors" respectively.

93-1506. (8907) Jury box No. 3. The clerk must keep, in addition to the two boxes specified in the last two sections, a third box, known as and marked "jury box No. 3," in which he must deposit capsules containing duplicate numbers of all persons selected and returned as trial jurors, who reside in the city or town where a trial term or session of a court of record is held, pursuant to law.

History: En. Sec. 265, C. Civ. Proc. 1895; re-en. Sec. 6353, Rev. C. 1907; amd. Sec. 5, Ch. 35, L. 1919; re-en. Sec. 8907, R. C. M. 1921; amd. Sec. 7, Ch. 168, L. 1957.

Amendment

The 1957 amendment substituted the

word "numbers" for the words "ballots, with the names and the proper additions."

References

Cited in *State v. Hay*, 120 M 573, 194 P 2d 232, 235; *State v. Porter*, 125 M 503, 242 P 2d 984, 986.

93-1507. (8908) Repealed.**Repeal**

This section (Sec. 266, C. Civ. Proc. 1895; amd. Sec. 6, Ch. 35, L. 1919), relat-

ing to the deposit of ballots in box No. 3, was repealed by Sec. 10, Ch. 168, Laws 1957, effective January 1, 1958.

93-1509. (8910) Sheriff to summon jurors, how. The sheriff, as soon as he receives a list or lists of jurors drawn, shall summon the persons named therein to attend the court at the time mentioned in the order, by a written notice by certified mail to that effect addressed to them to the postoffice address named in the jury list and deposited in the postoffice with the postage thereon prepaid, except in cases where the district judge expressly directs that such service shall be made by giving personal notice, and shall return the list to the court at the opening of the regular session thereof, or at such session or time as the jurors may be ordered to attend, specifying the names of those who are summoned, and the manner in which each person was notified.

History: En. Sec. 280, C. Civ. Proc. 1895; re-en. Sec. 6356, Rev. C. 1907; amd. Sec. 1, Ch. 9, L. 1911; re-en. Sec. 8910, R. C. M. 1921; amd. Sec. 1, Ch. 88, L. 1959. Cal. C. Civ. Proc. Sec. 225.

Amendment

The 1959 amendment substituted the

words "certified mail" for "registered mail" in this section.

Repealing Clause

Section 2 of Ch. 88, Laws 1959 repealed all acts and parts of acts in conflict therewith.

93-1510. (8911) Jurors drawn from jury box No. 3, when. If a sufficient number of trial jurors, duly drawn and notified, do not attend or cannot be obtained in the opinion of the court, without great delay or expense to form a jury, the court may, in its discretion, direct the clerk to draw from box No. 3, in the presence of the court, the numbers corresponding to the names of as many jurors on the jury list as the court deems sufficient for that purpose.

History: En. Sec. 281, C. Civ. Proc. 1895; re-en. Sec. 6357, Rev. C. 1907; re-en. Sec. 8911, R. C. M. 1921; amd. Sec. 8, Ch. 168, L. 1957. Cal. C. Civ. Proc. Sec. 226.

Amendment

The 1957 amendment substituted the words "numbers corresponding to the names of as many jurors on the jury list" for the words "names of as many persons."

Called Judge—Authority

A judge called in under the provisions of section 93-901 has the authority to draw additional jurors from jury box No. 3 to serve for the remainder of the term. *State v. Hay*, 120 M 573, 194 P 2d 232, 234, distinguished in 242 P 2d 985.

Operation and Effect

It was error for the trial judge to deny the defendant's motion to obtain additional jurors from jury box No. 1, when the inadequacy of the panel jury was called to the attention of the court six days before the case was to be tried, and at the trial the judge then called addi-

tional jurors from box No. 3. Defendant believed that a "Maine Street" jury would be antagonistic towards him and he made a timely request to have the venire augmented by additional jurors drawn from the entire county. Failure to provide an adequate panel was an abuse of discretion and amounted to the systematic and calculated exclusion of persons residing throughout the county at large other than those living in the city of Helena. *State v. Porter*, 125 M 503, 242 P 2d 984, 986.

Right to Draw From Box No. 3

Where seventy jurors were drawn from jury box No. 1, there was no abuse of discretion in not drawing more and no constitutional rights were violated by drawing from jury box No. 3 after the original panel was exhausted. *State v. Hay*, 120 M 573, 194 P 2d 232, 235, distinguished in 242 P 2d 985.

References

Cited in *State v. Allison*, 122 M 120, 199 P 2d 279, 283.

93-1511. (8912) Summoning jurors to complete a panel. The sheriff must forthwith notify each person whose number has been drawn and make a return as prescribed in section 93-1509.

History: En. Sec. 282, C. Civ. Proc. 1895; re-en. Sec. 6358, Rev. C. 1907; re-en. Sec. 8912, R. C. M. 1921; amd. Sec. 9, Ch. 168, L. 1957.

Amendment

The 1957 amendment substituted the words "whose number has been drawn" for the words "so drawn."

Repealing Clause

Section 10 of Ch. 168, Laws 1957 read "That sections 93-1405 and 93-1507, and all acts and parts of acts in conflict herewith are hereby repealed."

Effective Date

Section 11 of Ch. 168, Laws 1957 provided the act should be in full force and effect from and after January 1, 1958.

CHAPTER 19—COURT REPORTERS

- Section 93-1901. Appointment of court reporters.
 93-1902. Duties of reporters.
 93-1903. Same.
 93-1904. To furnish copies to parties, etc.
 93-1905. Amount to be paid by each party in civil action.
 93-1906. Salary and expenses of reporter—apportionment.
 93-1907. Reporter pro tempore.
 93-1908. Reporter's report prima facie evidence.

93-1901. (8928) Appointment of court reporters. The judge of a district court may appoint a reporter for such court, who is an officer of the court, and holds his office during the pleasure of the judge appointing him, that he must subscribe the constitutional oath of office, and file the same with the clerk of the court. In districts where there are two or more judges, each judge may appoint a reporter.

History: En. Sec. 370, C. Civ. Proc. 1895; re-en. Sec. 6373, Rev. C. 1907; re-en. Sec. 8928, R. C. M. 1921; amd. Sec. 1, Ch. 22, L. 1961. Cal. C. Civ. Proc. Sec. 269.

Amendment

The 1961 amendment substituted "reporter" for "stenographer," both times it appears in the section.

93-1902. (8929) Duties of reporters. Each reporter must, under the direction of the judge attend all sittings of the court, take full stenographic notes of the testimony, and of all proceedings given or had thereat, except when the judge dispenses with his services in a particular cause, or with respect to a portion of the proceedings therein. The reporter must file with the clerk forthwith the original stenographic notes taken upon a trial or hearing required to be taken by this section.

History: En. Sec. 371, C. Civ. Proc. 1895; re-en. Sec. 6374, Rev. C. 1907; re-en. Sec. 8929, R. C. M. 1921; amd. Sec. 2, Ch. 22, L. 1961. Cal. C. Civ. Proc. Sec. 269.

Amendment

The 1961 amendment substituted "reporter" for "stenographer," both times it appears in the section.

93-1903. (8930) Same. All objections made, the rulings, decisions, and opinions of the court, and the exceptions taken during the trial or hearing, must be written out at length or printed in type by the reporter, and filed with the clerk forthwith after the close of the trial or hearing, and thereafter such exceptions may be settled in a bill of exceptions, as provided in section 93-5505.

History: En. Sec. 372, C. Civ. Proc. 1895; re-en. Sec. 6375, Rev. C. 1907; re-en. Sec. 8930, R. C. M. 1921; amd. Sec. 3, Ch. 22, L. 1961. Cal. C. Civ. Proc. Sec. 269.

Amendment

The 1961 amendment substituted "reporter" for "stenographer."

93-1904. (8931) To furnish copies to parties, etc. Each reporter specified in this chapter must likewise, upon request, furnish, with all reasonable diligence, to the defendant in a criminal cause, or a party or his attorney in a civil cause, in which he has attended the trial or hearing, a copy, written out at length or in narrative form, from his stenographic notes, of the testimony and proceedings, or a part thereof, upon the trial or hearing, upon payment by the person requiring the same, the sum of five cents per folio for the copy written out at length, and seven and one-half cents per folio for the copy written out in narrative form. If the county attorney or attorney-general or judge requires such copy in a criminal cause, the reporter is entitled to his fees therefor; but he must furnish it, and upon furnishing it, he shall receive a certificate of the sum to which he is so entitled, which is a county charge, and must be paid by the county treasurer upon the certificate like other county charges. If the judge requires such a copy in a civil case to assist him in rendering a decision, the reporter must furnish the same without charge therefor. If it appears to the judge that a defendant in a criminal case is unable to pay for such copy, the same shall be furnished him and paid for by the county.

History: En. Sec. 373, C. Civ. Proc. 1895; re-en. Sec. 6376, Rev. C. 1907; re-en. Sec. 8931, R. C. M. 1921; amd. Sec. 4, Ch. 22, L. 1961.

Application of Section

This section governs only the furnishing of copies of the transcript of record for use in the trial court and has nothing to do with appeals to the Supreme Court. *Sullivan v. Board of County Comrs.*, 124 M 364, 224 P 2d 135, 136.

Amendment

The 1961 amendment substituted "reporter" for "stenographer," the three times it appears in this section.

93-1905. (8932) Amount to be paid by each party in civil action. In every issue of fact in civil actions tried before the court or jury, before the trial commences, there must be paid into the hands of the clerk of the court, by each party to the suit, the sum of three dollars, which sum must be paid by said clerk into the treasury of the county where the cause is tried, to be applied upon the payment of the salary of the reporter, and the prevailing party may have the amount so paid by him taxed in his bill of costs as proper disbursements.

History: En. Sec. 1979, 5th Div. Comp. Stat. 1887; re-en. Sec. 374, C. Civ. Proc. 1895; re-en. Sec. 6377, Rev. C. 1907; re-en. Sec. 8932, R. C. M. 1921; amd. Sec. 5, Ch. 22, L. 1961.

Amendment

The 1961 amendment substituted "reporter" for "stenographer."

93-1906. (8933) Salary and expenses of reporter — apportionment. Every reporter appointed under the provisions of this chapter receives an annual salary of six thousand six hundred dollars (\$6,600.00) and no other compensation except as provided in section 93-1904, provided, however, that all transcripts and bills of exceptions required by the county shall be furnished without cost, payable in monthly installments out of the general funds of the counties comprising the district for which he is appointed, according and in proportion to the number of civil and criminal actions entered and commenced in the district courts of such counties respectively in the preceding year; and it shall be the duty of the judge

of such district, on the first day of January of each year, or as soon thereafter as may be, to apportion the amount of such salary to be paid by each county in his district on the basis aforesaid. The reporter is allowed, in addition to the salary and fees above provided, in judicial districts comprising more than one (1) county, his actual and necessary expenses of transportation and living when he goes on official business to a county of his judicial district other than the county in which he resides, from the time he leaves his place of residence until he returns thereto, said expenses to be apportioned and payable in the same way as the salary.

History: En. Sec. 375, C. Civ. Proc. 1895; re-en. Sec. 6378, Rev. C. 1907; amd. Sec. 1, Ch. 80, L. 1909; re-en. Sec. 8933, R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1927; amd. Sec. 1, Ch. 73, L. 1945; amd. Sec. 1, Ch. 49, L. 1951; amd. Sec. 1, Ch. 125, L. 1953; amd. Sec. 1, Ch. 76, L. 1955; amd. Sec. 6, Ch. 22, L. 1961. Cal. C. Civ. Proc. Secs. 271 and 274.

Amendments

The 1951 amendment raised the salary of the stenographer from \$3,600 to \$4,200.

The 1953 amendment raised the salary of the stenographer from \$4,200 to \$4,800

and added the proviso in the middle of the first sentence.

The 1955 amendment raised the salary of the stenographer from \$4,800 to \$5,400 and substituted the word "thereafter" for "after" near the end of the first sentence.

The 1961 amendment substituted "reporter" for "stenographer," both times it appears in the section, and raised the salary of the reporter from \$5,400 to \$6,600.

Repealing Clauses

Section 2 of Ch. 49, Laws 1951; Sec. 2 of Ch. 125, Laws 1953 and Sec. 2 of Ch. 76, Laws 1955 repealed all acts and parts of acts in conflict therewith.

93-1907. (8934) Reporter pro tempore. The reporter of any district court must attend to the duties of his office in person, except when excused for good and sufficient reason by order of the court, which order must be entered upon the minutes of the court. Employment in his professional capacity elsewhere is not a good and sufficient reason for such excuse. When the reporter of any court has been excused in the manner provided in this section, the court may appoint a reporter pro tempore, who must take the same oath and perform the same duties and receive the same compensation during the time of his employment as the regular reporter.

History: En. Sec. 376, C. Civ. Proc. 1895; re-en. Sec. 6379, Rev. C. 1907; re-en. Sec. 8934, R. C. M. 1921; amd. Sec. 7, Ch. 22, L. 1961.

Amendment

The 1961 amendment substituted "reporter" for "stenographer" wherever it appears in the section.

93-1908. (8935) Reporter's report prima facie evidence. The report of the reporter, or reporter pro tempore, of any court, duly appointed and sworn, when written out in long handwriting, or printed in type, and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie a correct statement of such testimony and proceedings.

History: En. Sec. 377, C. Civ. Proc. 1895; re-en. Sec. 6380, Rev. C. 1907; re-en. Sec. 8935, R. C. M. 1921; amd. Sec. 8, Ch. 22, L. 1961. Cal. C. Civ. Proc. Sec. 273.

Amendment

The 1961 amendment substituted "re-

porter" for "stenographer" both times it appears in the section.

Repealing Clause

Section 9 of Ch. 22, Laws 1961 read "Any act or part of any act in conflict herewith, in whole or in part, is hereby repealed to the extent of such conflict."

CHAPTER 20—ATTORNEYS—QUALIFICATIONS—ADMISSION— LICENSE AND DISBARMENT

Section 93-2010. Annual license tax of attorneys.

93-2002. (8937) Qualifications, examination and admission.

Operation and Effect

Where an applicant took and failed the bar examination three times, the supreme court will not allow a petition by the applicant to admit the applicant on motion and without examination for this

would set at naught the labors and recommendations of the board of law examiners and nullify the governing statutes and rules of the court. *Petition of Bergen*, 125 M 607, 233 P 2d 399.

93-2010. (8945) Annual license tax of attorneys. Every attorney or counselor-at-law, admitted by the supreme court of the state to practice his profession within the state, shall be required to pay a license tax of ten dollars per annum, which tax shall be payable to and collected by the clerk of the supreme court on or before the first day of April of each year.

Upon the payment of such tax the said clerk shall issue and deliver a certificate to the person paying the same, certifying to the payment of said license tax, and stating the period covered by said payment. No license tax shall be imposed upon attorneys by a municipality or any other subdivision of the state.

History: En. Sec. 2, Ch. 90, L. 1917; re-en. Sec. 8945, R. C. M. 1921; amd. Sec. 1, Ch. 18, L. 1961.

license tax in the first paragraph from \$5 to \$10, and deleted in the first paragraph, after the words "per annum," the words "from and after the first day of April, A. D. 1917."

Amendment

The 1961 amendment increased the li-

CHAPTER 21—ATTORNEYS—POWERS—DUTIES— LIABILITIES AND COMPENSATION

93-2104. (8977) Death or removal of attorney.

Extension of Filing Time

There was no merit to an appellant's argument in opposition to a motion to strike a bill of exceptions that because an extension of time could not exceed 90 days without the consent of the adverse party pursuant to section 93-8708, and because he could not get an extension until a new attorney for the adverse party was appointed pursuant to this section, he was prevented from making a timely filing of his bill. Even though appellee's attorney may have died, this section is not designed to enable a prospective appellant to disregard the time limitation on filing a bill, by delaying notice to the adverse party to appoint a new attorney. *Berg v. Fraser*, — M —, 349 P 2d 317, 319.

Operation and Effect

Where there is a failure to show that the procedure has been followed when an attorney for a party litigant dies, a motion to dismiss the appeal will be denied. In re *Estate of Burton L. Knowles*, 130 M 637, 304 P 2d 923.

When one attorney dies, appointment of a successor must be demanded. *Hand v. Hand*, 131 M 571, 312 P 2d 990, 993.

Where a divorced wife's attorney died and defendant husband did not demand the appointment of a successor, the special appearance by an attorney to quash an order that the wife show cause why the divorce decree should not be modified did not waive the defect that there was no statutory substitution of an attorney. *Hand v. Hand*, 131 M 571, 312 P 2d 990, 993.

93-2120. (8993) Lien for compensation.

Extent of Lien

Where, in second trial of conversion action, plaintiff obtained judgment against defendant, the attorney's lien on the judgment covered only the amount which

would be realized on the judgment after costs accruing to defendant on appeal from first trial were deducted. *Galbreath v. Armstrong*, 121 M 387, 193 P 2d 630, 635.

Notice

Under this section there is no need to file a notice of lien, the commencement of an action or the service of an answer containing a counterclaim being sufficient notice of the lien of the attorney. *Galbreath v. Armstrong*, 121 M 387, 193 P 2d 630, 634.

Priority of Lien

While an attorney's lien is subordinate to the rights of the adverse party to offset judgments in the same actions or in ac-

tions based on the same actions or in actions based on the same transactions, it is nevertheless superior to any right to offset judgments obtained in wholly independent actions. *Galbreath v. Armstrong*, 121 M 387, 193 P 2d 630, 634.

An attorney's lien for unpaid compensation is not superior to the adverse party's claim for costs accruing as a part of the litigation on the cause of action. *Galbreath v. Armstrong*, 121 M 387, 193 P 2d 630, 635.

93-2121. (8994) Attorney may be compelled to show his authority.**References**

Cited or applied in *State ex rel. Coleman v. District Court*, 120 M 372, 186 P 2d 91, 93.

CHAPTER 22—JUDICIAL REMEDIES, ACTIONS AND SPECIAL PROCEEDINGS

93-2201. (8995) Judicial remedies defined.**References**

Cited or applied in *State ex rel. Reid*

v. District Court, 126 M 586, 256 P 2d 546, 549.

93-2202. (8996) Division of judicial remedies.**References**

Cited or applied in *State ex rel. Reid v.*

District Court, 126 M 586, 256 P 2d 546, 549.

93-2203. (8997) Action defined.**References**

Cited or applied in *State ex rel. Reid v.*

District Court, 126 M 586, 256 P 2d 546, 549.

93-2204. (8998) Special proceeding defined.**Probate Proceedings**

The administration of an estate of a deceased person is neither an action at

law nor a suit in equity but it is a special proceeding. *State ex rel. Reid v. District Court*, 126 M 586, 256 P 2d 546, 549.

CHAPTER 23—FORM OF CIVIL ACTION

93-2301. (9008) One form of civil action only.**References**

Cited or applied in *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 999.

93-2303. (9010) Repealed.**Repeal**

This section (Sec. 3, p. 136, L. 1867; Sec. 3, p. 40, L. 1877), relating to trial of special issues not made by pleadings, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-9(b).

References

Cited or applied in *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 999.

CHAPTER 24—TIME OF COMMENCING ACTIONS GENERALLY

93-2401. (9011) Commencement of civil actions.

Inclusion or exclusion of first and last day for purposes of statute of limitations. 20 ALR 2d 1249.

Estoppel to rely on statute of limitations. 24 ALR 2d 1413.

CHAPTER 25—LIMITATION OF ACTIONS FOR RECOVERY OF REAL PROPERTY

- Section 93-2502. When actions cannot be brought by grantee from the state.
- 93-2504. Seizin within five years—when necessary in actions for real property—action for dower.
- 93-2505. Such seizin, when necessary in action or defense arising out of title to or rents of real property.
- 93-2506. Entry on real estate.
- 93-2507. Possession—when presumed—occupation deemed under legal title, unless adverse.
- 93-2508. Occupation under written instrument or judgment—when deemed adverse.
- 93-2512. Relation of landlord and tenant as affecting adverse possession.
- 93-2513. Occupancy and payment of taxes necessary to prove adverse possession.
- 93-2515. Certain disabilities excluded from time to commence actions.
- 93-2516. Application of chapter to lands sold and conveyed by state.

93-2502. (9013) When actions cannot be brought by grantee from the state. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this state, unless the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the property in question within ten (10) years before the commencement of the action. In any such action the state of Montana may be made a party defendant, and shall have only the defenses thereto as are available to other parties defendant to the action; provided that no judgment in any such action shall include damages, attorney fees or court costs against the state of Montana.

History: En. Sec. 481, C. Civ. Proc. 1895; re-en. Sec. 6430, Rev. C. 1907; re-en. Sec. 9013, R. C. M. 1921; amd. Sec. 1, Ch. 196, L. 1955. Cal. C. Civ. Proc. Sec. 316.

"unless the same might have been commenced by the state as herein specified, in case such patent had not been issued or grant made."

Amendment

The 1955 amendment substituted all that part of the section beginning with the words "unless the plaintiff * * *" for

Repealing Clause

Section 2 of Ch. 196, Laws 1955 repealed all acts and parts of acts in conflict therewith.

93-2504. (9015) Seizin within five years—when necessary in actions for real property—action for dower. No action for the recovery of real property, or for the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within five [5] years before the commencement of the action. No action for the recovery of dower can be maintained by a widow unless the action is commenced within ten [10] years after the death of her husband.

History: Ap. p. Sec. 29, p. 45, L. 1877; re-en. Sec. 29, 1st Div. Rev. Stat. 1879; re-en. Sec. 29, 1st Div. Comp. Stat. 1887; amd. Sec. 483, C. Civ. Proc. 1895; re-en. Sec. 6432, Rev. C. 1907; re-en. Sec. 9015,

R. C. M. 1921; amd. Sec. 1, Ch. 224, L. 1953. Cal. C. Civ. Proc. Sec. 318.

Amendment

The 1953 amendment substituted "five

years" for "ten years" the first time it appeared in this section.

Application for Tax Deed

The affidavit of service of notice of application for tax deed must recite whether the premises involved were occupied or unoccupied and if occupied by whom. Failure to so recite is a fatal defect. *Davis v. Steingruber*, 131 M 468, 311 P 2d 784, 786.

Ditch Right

Title by prescription to a ditch conveying water may be obtained by use thereof whenever water is needed. *Te Selle v. Storey*, 133 M 1, 319 P 2d 218, 220.

Where deed to defendant after describing property by legal subdivisions contained clause: "Together with all the tenements, hereditaments and appurtenances, water rights and water ditches to the same belonging," if defendant's predecessor used the ditch for more than ten years there was title in him by prescription which passed to defendant by deed and it was of no consequence that the deed did not specifically mention the ditch right as an appurtenance. *Te Selle v. Storey*, 133 M 1, 319 P 2d 218, 220.

Operation and Effect

Where plaintiff's complaint alleges that "plaintiff is now the owner, entitled to possession," there is a presumption under section 93-2507 that the person establishing a legal title to the property is in possession thereof within the time required by law, and it is up to the other party to overcome the presumption with proof. *Warren v. Warren*, 127 M 259, 261 P 2d 364, 365.

Where party was the owner of the surface rights of land but there was a reserved right of entry for mining purposes in another person, the owner of the

surface rights could not acquire any right by adverse possession unless he could show possession of the mine independently of the possession of the surface of the land for grazing or other purposes. *Lehfeldt v. Adams*, 130 M 395, 303 P 2d 934, 937.

In an action to quiet title, the fact that a county, which was named party defendant several months after the action was commenced, may have been entitled to assert the statute of limitations as a defense, did not make the same defense available to the plaintiff against a cross-complaint filed before the lapse of the 10-year period following the plaintiff's acquisition of a tax title. *Marek v. Smith*, 132 M 73, 314 P 2d 864, 865.

Where new parties are brought into a case, and it appears that between the commencement of the suit and the time when they are brought in, the period of limitations had expired, the new parties may plead the statute of limitations for themselves, but the plea is not available to the original defendants. *Marek v. Smith*, 132 M 73, 314 P 2d 864, 866.

This section applies to a case where a fence was erected prior to the government survey and with intent to claim all within the fence even though a subsequent patent based on the survey lines does not include all to the fence. *Thibault v. Flynn*, 133 M 461, 325 P 2d 914.

References

Cited or applied in *Laas v. All Persons*, 121 M 43, 189 P 2d 670, 671; *Barcus v. Galbreath*, 122 M 537, 207 P 2d 559, 561; *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 497; *Bond v. Birk*, 126 M 250, 247 P 2d 199, 200; *Flathead Lumber Corp. v. Everett*, 127 M 291, 263 P 2d 376, 377.

93-2505. (9016) Such seizure, when necessary in action or defense arising out of title to or rents of real property. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within five [5] years before the commencement of the act in respect to which such action is prosecuted or defense made.

History: Ap. p. Sec. 30, p. 45, L. 1877; re-en. Sec. 30, 1st Div. Rev. Stat. 1879; re-en. Sec. 30, 1st Div. Comp. Stat. 1887; amd. Sec. 484, C. Civ. Proc. 1895; re-en. Sec. 6433, Rev. C. 1907; re-en. Sec. 9016, R. C. M. 1921; amd. Sec. 2, Ch. 224, L. 1953. Cal. C. Civ. Proc. Sec. 319.

Amendment

The 1953 amendment substituted "five years" for "ten years" in this section.

Operation and Effect

The bringing of an action against one in adverse possession disputing his title arrests the running of the statute. *Flathead Lumber Corp. v. Everett*, 127 M 291, 263 P 2d 376, 378.

Where party was the owner of the surface rights of land but there was a reserved right of entry for mining purposes in another person, the owner of the sur-

face rights could not acquire any rights by adverse possession unless he could show possession of the mine independently of the possession of the surface of the land for grazing or other purposes. *Lehfeltdt v. Adams*, 130 M 395, 303 P 2d 934, 937.

Pleading

Since a person in adverse possession can acquire no new right as against the plaintiffs by the mere fact that they remain in possession during the pendency of the action it follows that a pleading of adverse possession by defendants for ten years is insufficient to constitute a defense unless it is alleged that the ten years were before the commencement of the action, and the trial court erred in sustaining a motion for judgment on the pleadings and in entering judgment thereon for defendants. *Flathead Lumber*

Corp. v. Everett, 127 M 291, 263 P 2d 376, 378.

Possession By Constructive Trustee

Where daughter deeded property to mother to be held in trust for her and later mother deeded property to another daughter with the understanding that it was to be held for the benefit of the first daughter, the possession of the mother and the second daughter was the possession of and for the first daughter and therefore an action by the first daughter to recover the property was not barred. *Opp v. Boggs*, 121 M 131, 193 P 2d 379, 384, distinguished in 315 P 2d 314.

References

Cited or applied in *Laas v. All Persons*, 121 M 43, 189 P 2d 670, 671; *Bond v. Birk*, 126 M 250, 247 P 2d 199, 200; *Te Selle v. Storey*, 133 M 1, 319 P 2d 218, 219.

93-2506. (9017) Entry on real estate. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one [1] year after making such entry, and within five [5] years from the time when the right to make it descended or accrued.

History: Ap. p. Sec. 3, p. 466, *Bannack Stat.*; re-en. Sec. 3, p. 515, *Cod. Stat.* 1871; amd. Sec. 31, p. 46, L. 1877; re-en. Sec. 31, 1st Div. Rev. Stat. 1879; re-en. Sec. 31, 1st Div. Comp. Stat. 1887; amd. Sec. 485, C. Civ. Proc. 1895; re-en. Sec. 6434, Rev. C. 1907; re-en. Sec. 9017, R.

C. M. 1921; amd. Sec. 3, Ch. 224, L. 1953. Cal. C. Civ. Proc. Sec. 320.

Amendment

The 1953 amendment substituted "five years" for "ten years" in this section.

93-2507. (9018) Possession—when presumed—occupation deemed under legal title, unless adverse. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for five [5] years before the commencement of the action.

History: En. Sec. 4, p. 466, *Bannack Stat.*; re-en. Sec. 4, p. 515, *Cod. Stat.* 1871; amd. Sec. 32, p. 46, L. 1877; re-en. Sec. 32, 1st Div. Rev. Stat. 1879; re-en. Sec. 32, 1st Div. Comp. Stat. 1887; amd. Sec. 486, C. Civ. Proc. 1895; re-en. Sec. 6435, Rev. C. 1907; re-en. Sec. 9018, R. C. M. 1921; amd. Sec. 4, Ch. 224, L. 1953. Cal. C. Civ. Proc. Sec. 321.

Amendment

The 1953 amendment substituted "five years" for "ten years" in this section.

Burden of Proof

In action by mortgagor to quiet title to grazing lands burden of proving adverse possession was upon the plaintiff. *Bell v. Gussenhoven*, 132 M 346, 318 P 2d 251, 253.

Possession Under Contract for Deed

Possession under contract for deed was subordinate to title of owner. *Hinton v. Staunton*, 124 M 534, 228 P 2d 461, 463.

Presumption of Possession

Upon a motion to set aside a default judgment wherein the person in his affidavit of merits alleged that he was the record owner of the real estate he set up a prima facie defense to the original action because of the presumption of this section that the person who has legal title is in possession. *Holen v. Phelps*, 131 M 146, 308 P 2d 624, 627.

References

Cited or applied in *Lowery v. Garfield County*, 122 M 571, 208 P 2d 478, 486; *Kenney v. Bridges*, 123 M 95, 208 P 2d 475, 478; *Warren v. Warren*, 127 M 259,

261 P 2d 364, 365; Flathead Lumber Corp. v. Everett, 127 M 291, 263 P 2d 376, 377.

Acquisition of title to mines or minerals by adverse possession. 35 ALR 2d 124.

Good faith as affecting acquisition of title to mines or minerals by adverse possession. 35 ALR 2d 138.

93-2508. (9019) Occupation under written instrument or judgment—when deemed adverse. When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five [5] years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one [1] lot is not deemed a possession of any other lot of the same tract.

History: En. Sec. 33, p. 46, L. 1877; re-en. Sec. 33, 1st Div. Rev. Stat. 1879; re-en. Sec. 33, 1st Div. Comp. Stat. 1887; amd. Sec. 487, C. Civ. Proc. 1895; re-en. Sec. 6436, Rev. C. 1907; re-en. Sec. 9019, R. C. M. 1921; amd. Sec. 5, Ch. 224, L. 1953. Cal. C. Civ. Proc. Sec. 322.

Amendment

The 1953 amendment substituted "five years" for "ten years" in this section.

Color of Title

A tax deed, though void, is ample as color of title so as to sustain the claim of adverse possession. *Hentzy v. Mandan Loan & Investment Co.*, 129 M 324, 286 P 2d 325, 327, explained in 313 P 2d 1014.

Color of title may be evidenced by a contract for the sale of land. An instrument which purports to convey the land or the right to its possession is sufficient color of title as a basis for adverse possession if the claim is made in good faith. *Hentzy v. Mandan Loan & Investment Co.*, 129 M 324, 286 P 2d 325, 327, explained in 313 P 2d 1014.

Where county leased property, which it obtained by tax deed in 1930, to persons in 1940, and entered into a contract for sale

Possession of mortgagor or successor in interest as adverse to purchaser at foreclosure sale. 38 ALR 2d 348.

Void tax deed, tax sale certificate, and the like, as constituting color of title. 38 ALR 2d 986.

Grantor's possession as adverse possession against grantee. 39 ALR 2d 353.

in 1941, the occupant had "color of title" under the tax deeds and contracts for deeds to support adverse possession even though such tax deeds to the county were void for failure to comply with all of the requirements. *Long v. Pawlowski*, 131 M 91, 307 P 2d 1079, 1081, explained in 313 P 2d 1014.

Tacking Possession

A wife may tack her possession on to that of her husband prior to his death and it is not necessary that the relationship of husband and wife be established by probate proceedings before this can be done where the relationship is admitted by the pleadings. *Barcus v. Galbreath*, 122 M 537, 207 P 2d 559, 564.

References

Cited or applied in *Pritchard Petroleum Co. v. Farmers' Co-op. Oil & Supply Co.*, 121 M 1, 190 P 2d 55, 61; *Laas v. All Persons*, 121 M 43, 189 P 2d 670, 672.

Adverse possession: sufficiency, as regards continuity, of seasonal possession other than for agricultural or logging purposes. 24 ALR 2d 632.

93-2509. (9020) What constitutes adverse possession, etc.

Application of Section

This section was inapplicable to claim of adverse title by plaintiff to grazing lands who contended that he had color of title by virtue of his patent, where proof disclosed that mortgage foreclosure proceedings divested him of title, leaving him with privilege of redemption which was not exercised. Upon the issuance of sheriff's certificate of sale, title vested in pur-

chaser. *Bell v. Gussenhoven*, 132 M 346, 318 P 2d 251, 253.

Facts Showing Adverse Possession

Where plaintiffs inclosed the land with barbed wire fence, cultivated the land, executed an oil and gas lease on the land, and mortgaged the land, there were sufficient facts to show adverse possession. *Laas v. All Persons*, 121 M 43, 189 P 2d 670, 674.

Where defendant paid taxes on land for more than ten years [since amended], staked out the land in lots and leased it at various times for different purposes, and the land was in defendant's name in the tax records, evidence was sufficient to show adverse possession. *Kenney v. Bridges*, 123 M 95, 208 P 2d 475.

References

Cited or applied in *Hentzy v. Mandan Loan & Investment Co.*, 129 M 324, 286 P 2d 325, 326; *Schumacher v. Cole*, 131 M 166, 309 P 2d 311, 313.

93-2510. (9021) Premises actually occupied under the claim, etc.

Operation and Effect

Protection of the land by a substantial enclosure with intent to claim to the enclosure is sufficient for adverse possession

under this section even though not based on a written instrument. *Thibault v. Flynn*, 133 M 461, 325 P 2d 914.

93-2511. (9022) What constitutes adverse possession under claim, etc.

Application of Section

This section was inapplicable where plaintiff did not claim grazing land on any title except adverse usage and there was no testimony in the record that the land had been protected by a substantial enclosure, nor had it been cultivated or improved. *Bell v. Gussenhoven*, 132 M 346, 318 P 2d 251, 253.

Operation and Effect

Protection of the land by a substantial enclosure with intent to claim to the enclosure is sufficient for adverse possession under this section even though not based on a written instrument. *Thibault v. Flynn*, 133 M 461, 325 P 2d 914.

References

Cited or applied in *Schumacher v. Cole*, 131 M 166, 309 P 2d 311, 313.

93-2512. (9023) Relation of landlord and tenant as affecting adverse possession. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five [5] years from the termination of the tenancy, or, where there has been no written lease, until the expiration of five [5] years from the time of the last payment of rent, notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods prescribed in this section.

History: En. Sec. 37, p. 47, L. 1877; re-en. Sec. 37, 1st Div. Rev. Stat. 1879; re-en. Sec. 37, 1st Div. Comp. Stat. 1887; amd. Sec. 491, C. Civ. Proc. 1895; re-en. Sec. 6440, Rev. C. 1907; re-en. Sec. 9023, R. C. M. 1921; amd. Sec. 6, Ch. 224, L. 1953. Cal. C. Civ. Proc. Sec. 326.

the lessee from questioning the title of his landlord. *Johnstone v. Sanborn*, — M —, 358 P 2d 399, 400.

Waiver of Benefits

The benefits of this section may be waived by the terms of the lease. *Johnstone v. Sanborn*, — M —, 358 P 2d 399, 400.

Possession by stranger claiming under conveyance by cotenant as adverse to other cotenant. 32 ALR 2d 1214.

Amendment

The 1953 amendment substituted "five years" for "ten years" in this section.

Purpose of Section

This section was designed to prevent

93-2513. (9024) Occupancy and payment of taxes necessary to prove adverse possession. In no case shall adverse possessions be considered established under the provisions of any section or sections of this code unless it shall be shown that the land has been occupied and claimed for a period of five [5] years continuously, and the party or persons, their predecessors and grantors, have, during such period, paid all the taxes, state, county, or municipal, which have been legally levied and assessed upon said land.

History: En. Sec. 1, Ch. 3, L. 1917; re-en. Sec. 9024, R. C. M. 1921; amd. Sec. 7, Ch. 224, L. 1953.

Amendment

The 1953 amendment substituted "five years" for "ten years" in this section.

Burden of Proof

One claiming water rights, by virtue of adverse possession, has the burden of proving every element of the claim. *Havre Irrigation Co. v. Majerus*, 132 M 410, 318 P 2d 1076, 1078.

Operation and Effect

Where plaintiff and his predecessor had remained in open, exclusive, notorious and adverse possession of an abandoned river channel since 1936 and had paid taxes on improvements thereon but not on the real property because none had been assessed it was sufficient for adverse possession. *Holland v. Custer County*, 127 M 23, 256 P 2d 1085.

Payment of Taxes

This section requires the payment of taxes only if there are any to be paid. *Barcus v. Galbreath*, 122 M 537, 207 P 2d 559, 564.

Payment of Taxes—Time for Payment

All that is required under this section is that the claimant shall have claimed the land for a period of ten years [since

amended] continuously and that he has paid all taxes levied during that period, but it is not necessary that each year's taxes should have been paid when due. *Laas v. All Persons*, 121 M 43, 189 P 2d 670, 675.

It is not necessary that the taxes be paid each year as assessed to meet the requirements of this section. *Barcus v. Galbreath*, 122 M 537, 207 P 2d 559, 564.

Possession Under Contract for Deed

Person holding possession of land under contract for deed could not establish title by adverse possession. *Hinton v. Staunton*, 124 M 534, 228 P 2d 461, 463.

Prior Title

This section does not apply to a claim perfected by adverse possession for the statutory period prior to 1917, the date of enactment hereof. *Thibault v. Flynn*, 133 M 461, 325 P 2d 914.

References

Cited or applied in *Opp v. Boggs*, 121 M 131, 193 P 2d 379, 385; *Lowery v. Garfield County*, 122 M 571, 208 P 2d 478, 486; *Lamping v. Diehl*, 126 M 193, 246 P 2d 230, 235; *Hentzy v. Mandan Loan & Investment Co.*, 129 M 324, 286 P 2d 325, 327.

Tacking adverse possession of area not within description of deed or contract. 17 ALR 2d 1128.

93-2515. (9026) Certain disabilities excluded from time to commence actions. If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or for dower, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, is at the same time such title first descends or accrues, either

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term of less than for life.

The time during which disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of five [5] years after such disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced or entry, or defense made, after that period.

History: Ap. p. Sec. 39, p. 48, L. 1877; re-en. Sec. 39, 1st Div. Rev. Stat. 1879; re-en. Sec. 39, 1st Div. Comp. Stat. 1887; amd. Sec. 493, C. Civ. Proc. 1895; re-en. Sec. 6442, Rev. C. 1907; re-en. Sec. 9026,

R. C. M. 1921; amd. Sec. 8, Ch. 224, L. 1953. Cal. C. Civ. Proc. Sec. 328.

Amendment

The 1953 amendment inserted the word "same" before the word "time" in the

first sentence and substituted "five years" for "ten years."

Separability Clause

Section 9 of Ch. 224, Laws 1953 read: "If any clause, sentence, paragraph, section, subdivision, or part of this act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, inoperative or unconstitutional, such decision shall not affect, impair or invalidate the remaining portions of this act, but shall be confined in its operation to the clause, sentence, paragraph, section, subdivision, or part directly adjudged to be invalid, inoperative or unconstitutional."

Repealing Clause

Section 10 of Ch. 224, Laws 1953 repealed all acts or parts of acts in conflict therewith.

Effective Date

Section 11 of Ch. 224, Laws 1953 provided the act should be in effect from and after July 1, 1953.

Minority—Time for Bringing Suit

Where the youngest of the heirs attained his majority more than ten years [since amended] before action to establish title to land, and they brought no action within that time, they could not defend such suit by party holding under tax deed and by adverse possession, on the ground that the heirs were minors at the time the tax deed was procured. *Laas v. All Persons*, 121 M 43, 189 P 2d 670, 674.

Tolling of statute of limitations where process is not served before expiration of limitation period as affected by statute, defining commencement of action, or expressly relating to interruption of running of limitations. 27 ALR 2d 236.

93-2516. Application of chapter to lands sold and conveyed by state. The provisions of this chapter shall apply to all lands heretofore sold and conveyed by the state of Montana for which a valid consideration was received by the state, provided, that the state, at the time of any such sale or conveyance, was not precluded by the Constitution of Montana or by the terms of the grant of such lands by the United States from selling and disposing of the same; and provided further, that no occupant of a public way or other ground dedicated or appropriated by the state to public use, and not subject to sale, shall acquire by reason of his occupancy any title thereto.

History: En. Sec. 1, Ch. 195, L. 1955.

Title of Act

An act to add to Chapter 25, Title 93, Revised Codes of Montana, 1947, by inserting section 93-2516, making the provisions of said Chapter 25, Title 93, ap-

plicable to certain lands heretofore sold and conveyed by the state of Montana.

Repealing Clause

Section 2 of Ch. 195, Laws 1955 repealed all acts and parts of acts in conflict therewith.

CHAPTER 26—LIMITATION OF OTHER ACTIONS

93-2601. (9027) Periods of limitation prescribed.

References

Cited or applied in *Kujich v. Lillie*, 127 M 125, 260 P 2d 383, 385; *State ex rel.*

Anderson v. State Board of Equalization, 133 M 8, 319 P 2d 221, 226; *Roundup v. Liebetran*, 134 M 114, 327 P 2d 810, 813.

93-2602. (9028) Within ten years.

Absence of judgment debtor from state as suspending or tolling running of period

of limitations as to judgment. 27 ALR 2d 839.

93-2603. (9029) Within eight years.

Action on Bond for Deed

Action to enforce "bond for deed" for certain mining rights in land was barred by this section. *Clinton v. Miller*, 124 M 463, 226 P 2d 487.

Effect of Suspension of Foreign Corporation

Held, that the suspension of a foreign corporation for nonpayment of taxes does not suspend the running of the statute

of limitations, and hence an action based on a mortgage would be barred after eight years under this section. The suspension does not result in an inability to get service of process on the foreign corporation for section 93-3007 provides for such service and section 93-3011 states that it is personal service so that a personal judgment may be entered on such service. *Montana Valley Land Co. v. Bestul*, 126 M 426, 253 P 2d 325.

Erroneous Pleading

Where this statute was pleaded as an affirmative defense and it was apparent that the pleader must have meant to plead section 93-2604, the applicable section, the protection of the latter could not be invoked. *Hagerty v. Hall*, 135 M 276, 340 P 2d 147.

Part Payment—Proof

Where the plaintiff in an action on a note executed in 1931 and payable within 90 days pleaded part payment in 1934 and 1938 to bar the statute of limitations, he has the burden of proof that the payments were made, and it is not sufficient to show the indorsement on the back of

the note. An indorsement of a payment on a note by the holder does not create a presumption that the payment was made at the time that the indorsement indicates. *Wight v. Stevenson*, 126 M 377, 252 P 2d 241.

Violation of Trust

In an action for an accounting, assuming that there was a trust relationship, when the plaintiff beneficiary in 1925 made complaint to the defendant as to how the expenses were charged and defendant denied that its conduct was wrong and continued to make similar charges, the statute of limitations began to run at that time, since at that time the plaintiff knew that the trust was being violated. *Potlatch Oil & Refining Co. v. Ohio Oil Co.*, 199 F 2d 766, 770.

References

Cited or applied in *Clarke v. Chamberlain*, 124 M 405, 225 P 2d 477, 481.

Entry or indorsement by creditor on note, bond, or other obligation as evidence of part payment which will toll the statute of limitations. 23 ALR 2d 1331.

93-2604. (9030) Within five years.

Applicable to Action for Care, Support and Maintenance

An action by the state against the estate of a person committed to the state hospital for the expenses of care, support and maintenance is one based upon a mutual, open and current account and the applicable statute of limitations does not commence to run until the day the last item for care, support and maintenance was furnished. *State v. Byrne*, — M —, 350 P 2d 380.

Commencement of Period—Resulting Trust

Statute of limitations does not commence to run in favor of the trustee of a resulting trust until the trustee disavows the trust or asserts some right inconsistent with it. *Campanello v. Mercer*, 124 M 528, 227 P 2d 312.

Defenses Not Barred

Limitation statutes apply only to actions and not to defenses; and evidence of payment by services rendered was admissible

although such services were done more than five years prior to filing of action. *Hagerty v. Hall*, 135 M 276, 340 P 2d 147.

Offset

Where debt was barred by five-year statute of limitations it could not be set up as an offset in a suit on a note and mortgage not arising out of the same transaction. *Francisco v. Francisco*, 120 M 468, 191 P 2d 317, 321, 1 ALR 2d 625, distinguished in 340 P 2d 149.

Revival of Obligation

Even though original debt is barred by statute of limitations, it is sufficient consideration for a subsequent note and new promise to pay, and such new note revives the obligation. *Betor v. Chevalier*, 121 M 337, 193 P 2d 374, 377.

References

Cited in *Potlatch Oil & Refining Co. v. Ohio Oil Co.*, 199 F 2d 766, 770; *Roundup v. Liebetran*, 134 M 114, 327 P 2d 810, 813.

93-2605. (9031) Within three years.

Operation and Effect

Where accident, in which defendant was driving, occurred November 26, 1941 and defendant died within three years thereof and letters of administration for his estate issued December 13, 1944, and an

action for tort against the estate was instituted December 11, 1945 within one year after the issuing of letters testamentary, the action was timely under section 93-2704 which provides that if a person against whom an action may be

brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of ad-

ministration. *Kujich v. Lillie*, 127 M 125, 260 P 2d 383, 385.

References

Cited in footnote 5 in *Zellmer v. Acme Brewing Co.*, 184 F 2d 940, 943; *Roundup v. Liebetran*, 134 M 114, 327 P 2d 810, 813.

93-2607. (9033) Two-year limitation.

Subd. 4

Applies to Actions for Fraud or Mistake as Commonly Used

This section applies only to fraud or mistake within the common acceptance of the term. *Opp v. Boggs*, 121 M 131, 193 P 2d 379, 385.

Real Property Held in Trust

Where daughter conveyed real property to her mother with the understanding that it was to be held in trust for her, and mother then deeded property to another daughter with the understanding that it was to be held in trust for the first daughter, an action brought by the first daughter to recover the property was not based on fraud but upon a failure to comply with the promise to reconvey the property and was therefor not barred by

this section. *Opp v. Boggs*, 121 M 131, 193 P 2d 379, 385, distinguished in 315 P 2d 1005.

Salary Erroneously Paid

Action against former commissioner of public works, appointed by former mayor of city, to recover money received as additional salary for managing housing projects was not barred by this section where city had no knowledge of the payments taken by commissioner. *Roundup v. Liebetran*, 134 M 114, 327 P 2d 810, 817.

References

Cited or applied in *Potlatch Oil & Refining Co. v. Ohio Oil Co.*, 199 F 2d 766, 770; *Bond v. Birk*, 126 M 250, 247 P 2d 199, 200; *State v. Byrne*, — M —, 350 P 2d 380, 381.

93-2609. (9035) Within six months.

References

Cited or applied in *Neil v. Lewis* and

Clark County, 133 M 323, 323 P 2d 270, 273.

93-2613. (9041) Actions for relief not hereinbefore provided for.

References

Cited or applied in *Bond v. Birk*, 126 M 250, 247 P 2d 199, 200.

93-2614. (9042) Where cause of action accrues on mutual account.

References

Cited or applied in *State v. Byrne*, — M —, 350 P 2d 380, 383.

93-2615. (9043) Actions by the state subject to, etc.

References

Cited or applied in *State v. Byrne*, — M —, 350 P 2d 380, 383.

CHAPTER 27—TIME OF COMMENCEMENT OF ACTIONS—GENERAL PROVISIONS CONCERNING

93-2702. (9048) Exception, where defendant is out of the state.

Application

This section does not toll the running of a statute of limitation in an action against a foreign corporation which was suspended from operating in the state for non-payment of taxes, since the person could get service of process on such cor-

poration through the secretary of state in accordance with sections 93-3007 and 93-3011 and a personal judgment could be entered on such service. *Montana Valley Land Co. v. Bestul*, 126 M 426, 253 P 2d 325.

93-2704. (9050) Provision where person entitled dies, etc.**Operation and Effect**

Where accident, in which defendant was driving, occurred November 26, 1941 and defendant died within three years thereof and letters of administration for his estate were issued December 13, 1944, and an action for tort against the defendant was instituted December 11, 1945 within one

year after the issuing of letters testamentary, the action was timely under this section. *Kujich v. Lillie*, 127 M 125, 260 P 2d 383, 385.

References

Cited or applied in *Kujich v. Lillie*, 127 M 125, 260 P 2d 383, 385.

93-2716. (9062) Acknowledgment and part payment.**References**

Cited or applied in *Potlatch Oil & Refining Co. v. Ohio Oil Co.*, 96 F Supp 685, 688.

CHAPTER 28—PARTIES TO CIVIL ACTIONS

93-2801. (9067) Repealed.**Repeal**

This section (Secs. 4 and 6, p. 136, L. 1867; Secs. 4 and 6, p. 40, L. 1877), requiring action to be prosecuted in the name of the party in interest, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2704-1(a).

Operation in General

In an action on account for the balance due on stumpage from timber sold to the defendant, it was not error to fail to join the plaintiff's wife or the vendors from whom the plaintiff and his wife had contracted to purchase the land, since it did not appear that their rights would be prejudiced by a decision in their absence. *Ballenger v. Tillman*, 133 M 369, 324 P 2d 1045, 1051.

Stockholder of Corporation

Single stockholder has no authority to bring action to quiet title where he alleges that corporation "is the sole and exclusive owner in fee simple title of the lands." *Noble v. Farmers' Union Trading Co.*, 123 M 518, 216 P 2d 925, distinguished in 284 P 2d 260.

Sole or majority stockholders of a corporation cannot maintain an action for the corporation. The reason is, that because the majority stockholders control the corporate machinery, they necessarily

control the corporation and through its officers and directors the defense and the prosecution of any litigation involving the corporation. The sole or majority stockholders then have no need to resort to the indirection of a stockholders' suit by grace of a court of equity to protect the corporate interests. Equity will deny them any such relief, if asked, because their remedy within the corporation is adequate. *Malcom v. Stondall Land & Investment Co.*, 129 M 142, 284 P 2d 258, 260.

As a general rule stockholders may not sue upon a cause of action belonging to their corporation whether in their own names or in the name of the corporation itself. Nor generally may they defend for it an action brought against the corporation as defendant. *Malcom v. Stondall Land & Investment Co.*, 129 M 142, 284 P 2d 258, 260.

Substitution of Parties

Where an action is pending at the time of a transfer of a portion of the original plaintiff's interest, the provisions of section 93-2824 [now superseded by section 93-2704-9] become applicable. *White v. Connor*, — M —, 354 P 2d 722, 731.

References

Cited or applied in *Cormier v. Fraser*, 130 M 170, 296 P 2d 1021, 1022.

93-2805. (9071) Repealed.**Repeal**

This section (Sec. 9, p. 136, L. 1867; Sec. 9, p. 41, L. 1877), relating to infant's appearance by guardian, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2704-1(b).

Sale by Administrator

Fact that no attorneys were appointed to represent minors in proceeding for sale of real estate by administrator of estate did not affect the validity of the proceedings under section 91-4316. *Haugan v. Yale Oil Corp.*, 124 M 1, 217 P 2d 1084, 1087.

93-2810. (9076) When representative may sue for death, etc.**Contributory Negligence**

Contributory negligence of a beneficiary is a bar to an action for death brought by or for such beneficiary. Hence, in an action against the United States for negligence in not providing proper ventilation in a parachute room, and failing to provide respirators so that the plaintiff's wife became ill from the inhalation of fumes and died, the plaintiff could not recover because he and his deceased wife were guilty of contributory negligence by using open containers of carbon tetrachloride and assumed the risk of inhaling the fumes. *Sartori v. U. S.*, 186 F 2d 679, 680, 682.

Liability of City for Tortious Act of City Policeman

In enforcing city ordinances and laws a

city policeman is acting as an agent of the state and the city, therefore, is not responsible in damages for his conduct. *Kingfisher v. City of Forsyth*, 132 M 39, 314 P 2d 876.

References

Cited in *State v. Lawrence*, 122 M 277, 201 P 2d 756; *Welch v. Nepstad*, 135 M 65, 337 P 2d 14, 18.

Proof to establish or negative self-defense in civil action for death from intentional act. 17 ALR 2d 597.

Conflict of laws as to survival or revival of wrongful death actions against estate or personal representative of wrongdoer. 17 ALR 2d 690.

93-2811. (9077) Repealed.**Repeal**

This section (Sec. 12, p. 136, L. 1867; Sec. 15, p. 42, L. 1877), specifying persons who may be joined as plaintiffs, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2704-4(a).

Insureds under Group Policy

In an action on a group insurance policy covering hospital and medical expenses, where all the plaintiffs were employees of a company and the policy was made directly with the employees who paid the

required premium and where the main issue was whether the policy was in effect on a certain date or whether it had been canceled, all the plaintiffs were interested in the question and the trial court did not abuse its discretion in overruling a demurrer on the ground of misjoinder of parties plaintiff. *Cantrell v. Benefit Assn. of Railway Employees*, — M —, 348 P 2d 345.

Appealability of order with respect to motion for joinder of additional parties. 16 ALR 2d 1023.

93-2812. (9078) Repealed.**Repeal**

This section (Sec. 13, p. 136, L. 1867; Sec. 16, p. 42, L. 1877), specifying persons who may be joined as defendants, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2704-4(a).

References

Cited or applied in *Feely v. Lacey*, 133 M 283, 322 P 2d 1104, 1109.

Corporation as necessary or proper party defendant in proceedings to determine validity of election or appointment of corporate director or officer. 21 ALR 2d 1048.

93-2813. Joinder of plaintiffs in actions concerning oil and gas leases.**References**

Cited or applied in *Braun v. Mon-O-Co Oil Corp.*, 133 M 101, 320 P 2d 366.

93-2816. (9080) Repealed.**Repeal**

This section (Sec. 2, Ch. 210, L. 1921), relating to service of process on the state,

was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2702-2.

93-2818. (9082) Repealed.**Repeal**

This section (Sec. 18, p. 43, L. 1877),

relating to joinder in action by parties holding title under a common source, was

repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2704-4(a).

93-2821. (9083) Repealed.

Repeal

This section (Sec. 14, p. 136, L. 1867; Sec. 19, p. 43, L. 1877), relating to parties in interest required to be joined, and to class actions, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2704-3(a) and 93-2704-7.

Insureds under Group Policy

In an action on a group insurance policy covering hospital and medical expenses where all the plaintiffs were employees of

93-2822. (9084) Repealed.

Repeal

This section (Sec. 15, p. 137, L. 1867; Sec. 20, p. 43, L. 1877), relating to joinder as defendants of persons severally liable

93-2824. (9086) Repealed.

Repeal

This section (Sec. 16, p. 137, L. 1867; Sec. 22, p. 43, L. 1877; Sec. 1, p. 98, L. 1883), relating to revival of actions, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2704-9.

Change of Venue

A motion seeking a change of venue under section 93-2906 is not a defense within the meaning of this section. McGraff v. McGillvray, 135 M 256, 342 P 2d 736.

93-2825. (9087) Repealed.

Repeal

This section (Sec. 23, p. 44, L. 1877), relating to interpleader, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2704-6.

Complaint Insufficient as Interpleader

In an interpleader action, allegations of defendants tending to show that plaintiff was not a disinterested stakeholder and that it had incurred an independent liability to other defendants, were improperly stricken on the plaintiff's motion, since by such motion plaintiff failed to maintain its position as a disinterested stakeholder. Central Montana Stockyards v. Fraser, 133 M 168, 320 P 2d 981, 995.

The petition or affidavit in interpleader must disclose some reasonable basis of conflicting claims to the fund or property. Central Montana Stockyards v. Fraser, 133 M 168, 320 P 2d 981, 993.

References

Cited in *Rosen v. Rozan*, 179 F Supp 829, 831.

a company and the policy was made directly with the employees who paid the required premium and where the main issue was whether the policy was in effect on a certain date or whether it had been canceled, all the plaintiffs were interested in the question and the trial court did not abuse its discretion in overruling a demurrer on the ground of misjoinder of parties plaintiff. *Cantrell v. Benefit Assn. of Railway Employees*, — M —, 348 P 2d 345.

on the same instrument, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2704-4(a).

Criminal Prosecution

Though a civil action does not abate by the death of a party if the cause of action survive, in a criminal prosecution the death of the convicted person abates the appeal. *State v. Lawrence*, 122 M 277, 201 P 2d 756.

Transfer of Interest

Where an action is pending at the time of a transfer of a portion of the original plaintiff's interest, the provisions of this section become applicable. *White v. Connor*, — M —, 354 P 2d 722, 731.

An attitude of perfect disinterestedness, excluding even an indirect interest by the plaintiff is necessary if plaintiff is to maintain a bill of interpleader. *Central Montana Stockyards v. Fraser*, 133 M 168, 320 P 2d 981, 994.

Right to Relief

In action to prohibit defendant from cancelling an agreement for sale of lands even though the deposit in court might be legally insufficient as a tender to defendant, plaintiff might be relieved from forfeiture upon a showing of facts sufficient to appeal to the conscience of a court of equity under section 17-102. *Blackfeet Tribe of the Blackfeet Indian Reservation v. Klies Livestock Co.*, 160 F Supp 131, 133, 141.

Where Rights to Property Determined in Previous Action

Where the rights and claims of parties

to attached property were fully determined by the supreme court in a prior action, the findings as to these matters were res judicata in a subsequent interpleader action. *Central Montana Stockyards v. Fraser*, 133 M 168, 320 P 2d 981, 991.

93-2826. (9088) Repealed.

Repeal

This section (Sec. 24, p. 44, L. 1877), relating to intervention, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2704-8.

Interest in the Matter in Litigation

Where a taxpayer, under proper procedure, filed an action against the county for a refund of taxes, the state and the state board of equalization have an interest in the subject-matter of the litigation so as to enable them to intervene in the

93-2828. (9090) Repealed.

Repeal

This section (Sec. 17, p. 137, L. 1867; Sec. 26, p. 45, L. 1877), relating to joinder of other parties by court order or on application, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2704-3(b) and 93-2704-8.

Condemnation Proceedings

Where, in a condemnation proceeding, an appeal had been perfected by the condemnor from an assessment by the commissioner and money deposited in the court had been withdrawn and the condemnor then sought to add a mortgagee as a party defendant in the condemnation action, the condemnor was entitled to have such mortgagee added as a party. *State ex rel. State Highway Comm. v. District Court*, — M —, 348 P 2d 132.

Indispensable Parties

Where electors brought action to enjoin a school district from carrying out contracts for construction of a gymnasium, the contractors were indispensable parties without whose presence the court is without jurisdiction to proceed with the case, particularly to a trial on the merits. *Miller v. Cut Bank High School District*, 130 M 499, 305 P 2d 319, 320. (Dissenting opinion, 130 M 499, 305 P 2d 319, 321.)

Operation and Effect

Where wife asks court to partition

93-2829. (9091) Action by joint-tenant against his cotenant.

References

Cited or applied in *Hennigh v. Hennigh*, 131 M 372, 309 P 2d 1022, 1025.

References

Cited or applied in *Feely v. Lacey*, 133 M 283, 322 P 2d 1104, 1109.

Appealability of order granting or denying substitution of parties. 16 ALR 2d 1057.

action, not only because part of the tax collected was a state levy but also because the determinative questions raised are of vital interest and concern as they pertain to the tax laws, the procedure thereto, and the public fiscal policy of the sovereign state. *Carlson v. Flathead County*, 130 M 24, 293 P 2d 273, 275. (Dissenting opinion, 130 M 24, 293 P 2d 273, 276.)

References

Cited or applied in *Feely v. Lacey*, 133 M 283, 322 P 2d 1104, 1109.

various parcels of real property in which she and her husband have an interest it is necessary that interested or affected persons be made parties. *Emery v. Emery*, 122 M 201, 200 P 2d 251, 265.

Where plaintiff did not ask the court to bring in some indispensable parties, the court cannot be put in error for not invoking this statute. *Miller v. Cut Bank High School District*, 130 M 499, 305 P 2d 319, 320. (Dissenting opinion, 130 M 499, 305 P 2d 319 at 321.)

In an action on account for the balance due on stumpage from timber sold to the defendant, it was not error to fail to join the plaintiff's wife or the vendors from whom the plaintiff and his wife had contracted to purchase the land, since it did not appear that their rights would be prejudiced by a decision in their absence. *Ballenger v. Tillman*, 133 M 369, 324 P 2d 1045, 1051.

Parties Not Required

Lower court did not lose jurisdiction by reason of its failure to bring in an additional party defendant whose interest would be unaffected by the proceedings. *Poepping v. Monson*, — M —, 353 P 2d 325, 329.

References

Cited or applied in *Feely v. Lacey*, 133 M 283, 322 P 2d 1104, 1109.

CHAPTER 29—PLACE OF TRIAL OF CIVIL ACTIONS

93-2901. (9093) Certain actions to be tried, etc.**Construction**

The phrase "subject of the action" as used in subdivision 1 is not synonymous with the term "cause of action" nor with the term "object of the action." Subject of the action denotes the plaintiff's principal primary right to enforce or main-

tain that for which the action is brought and does not denote the specific thing in regard to which the legal controversy is carried on. *Fraser v. Clark*, 128 M 160, 273 P 2d 105, 115. (Dissenting opinion, 128 M 160, 273 P 2d 105, 120.)

93-2904. (9096) Other actions, according to the residence of the parties.**Actions for Divorce**

This section determines the place of trial of divorce actions unless the court has the power to declare otherwise. *McNeill v. McNeill*, 122 M 413, 205 P 2d 510, 511.

Actions in Tort

Action brought two years after dissolution of partnership for damages resulting from false representations, a paragraph of the complaint alleging that defendant purchased a house with part of the partnership funds and that plaintiff was entitled to one-half the profits received on its sale, was for damages and at law and the proper venue of the county was in the county where the tort was committed. *Brownback v. Nelson*, 122 M 525, 206 P 2d 1017, 1020.

Lincoln County was the proper county for trial of action where complaint by which plaintiff commenced suit alleged plaintiff's ownership and right of possession of the timber in Lincoln County, conversion by the defendants and resulting damage. *Johnson v. Clark*, 131 M 454, 311 P 2d 772, 775.

Plaintiff by instituting his action in a county other than where the accident occurred or the defendant resided, waived his right to have the action tried in either of these counties, and defendant had the right to have the place of trial changed to either of the latter counties, *Seifert v. Gehle*, 133 M 320, 323 P 2d 269, 270.

Actions on Contract

The provisions of the second sentence of this section insofar as it relates to actions upon contracts is in the nature of an exception to the general rule enacted in the main clause of the first sentence which provides generally that actions be tried in the county of the defendant's residence. *Fraser v. Clark*, 128 M 160, 273 P 2d 105, 119. (Dissenting opinion, 128 M 160, 273 P 2d 105, 120.)

Early decisions uniformly held that in actions upon contracts the second sentence of this section applied only to actions upon express contracts wherein the contract sued upon discloses on its face that

it was to be performed in a particular county other than that of defendant's residence. Later cases departed from the earlier decisions and held that the performance exception applies to a contract which failed to state or provide for any place where such contract was to be performed. The case of *State ex rel. Interstate Lumber Co. v. District Court*, 54 M 602, 172 P 1030 went further and expressly overruled the earlier cases. The construction given in the *Interstate Lumber Co.* case and the overruling of the earlier decisions by the case are expressly disapproved. *Fraser v. Clark*, 128 M 160, 273 P 2d 105, 119. (Dissenting opinion, 128 M 160, 273 P 2d 105, 120.)

The word "may" in the second sentence of this section should not be given the force of "must." *Love v. Mon-O-Co Oil Corp.*, 133 M 56, 319 P 2d 1056, 1058.

Either the county of defendant's residence, or the county where the contract was to be performed, is the proper county for the trial of the action and if the plaintiff chooses either of these counties, defendant may not have it removed, except as stated in the last part of this section, it is still subject to the power of the court to change place of trial as provided in section 93-2906. *Love v. Mon-O-Co Oil Corp.*, 133 M 56, 319 P 2d 1056, 1059.

The performance exception, appearing in the second sentence of this section, applies only to such actions as are based upon contracts which plainly show, either (a) by their express terms, or (b) by necessary implication therefrom, that the contracting parties, at the time of contracting, did mutually agree upon a particular county, other than that of defendant's residence wherein they intended that their contract was to be performed. *Love v. Mon-O-Co Oil Corp.*, 133 M 56, 319 P 2d 1056, 1059.

Charge of Allegations in Subsequent Complaint

Where plaintiff in first complaint for damages alleged that false representations were made in one county, he was not precluded from alleging that the false representations were made in another county in a subsequent complaint since the repre-

sentation may have been made in both places. *Brownback v. Nelson*, 122 M 525, 206 P 2d 1017, 1020.

Construction

The general rule is that actions should be tried in the county in which the defendants reside at the commencement of the action. This is embodied in the first clause of the first section and the four subordinate clauses in that sentence provide alternatives which are departures from the general rule which are allowed under the circumstances set forth in the subordinate clauses. *Fraser v. Clark*, 128 M 160, 273 P 2d 105, 117. (Dissenting opinion, 128 M 160, 273 P 2d 105, 120.)

The word "may" as used in the last sentence applies to tort actions as well as to

contract actions. *Seifert v. Gehle*, 133 M 320, 323 P 2d 269, 270.

Venue Established by Contract

Defendant in action to recover monthly rental for electric signs was not entitled to change of venue where stipulation in contract established venue of any future suit or action instituted for enforcement of contract. *Electrical Products Consolidated v. Bodell*, 132 M 243, 316 P 2d 788, 789.

References

Cited in *State ex rel. McVay v. District Court*, 126 M 382, 251 P 2d 840, 848; *Kujich v. Lillie*, 127 M 125, 260 P 2d 383, 388.

93-2905. (9097) Repealed.

Repeal

This section (Sec. 61, p. 53, L. 1877; Sec. 1, Ch. 140, L. 1943), relating to venue of actions in the absence of demand by defendant for removal to the proper county, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-6(b).

Application of Section

When a timely and proper motion for a change of place of trial is pending, the court has no jurisdiction except first to rule on the motion for change of place of trial. *Johnson v. Clark*, 131 M 454, 311 P 2d 772, 777.

The district court must determine defendants' right to a change of place of trial to the proper county upon the state of plaintiff's original complaint as it stood at the time defendants first came into court and made their general appearance in the case. *Johnson v. Clark*, 131 M 454, 311 P 2d 772, 777.

Essential Steps to Change Venue

Venue may be changed if the statutory method of securing a change is invoked

and sufficient grounds are shown. *Electrical Products Consolidated v. Bodell*, 132 M 243, 316 P 2d 788, 789.

Waiver of Right

A defendant did not waive the right to a change of venue by asking the court for additional time to plead to certain causes of action after the motion was denied. (*State ex rel. Carroll v. District Court*, 69 M 415, 222 P 444, overruled.) *United States Fidelity and Guaranty Company v. State*, — M —, 345 P 2d 734.

When Change Required

Where divorce action was not brought in county of defendant's residence and defendant appeared by general demurrer, accompanied by written motion for change of venue, affidavit of merits and demand that the action be transferred to the county of his residence, the motion should have been granted. *McNeill v. McNeill*, 122 M 413, 205 P 2d 510.

References

Cited in *State ex rel. McVay v. District Court*, 126 M 382, 251 P 2d 840, 848.

93-2906. (9098) Place of trial may be changed in certain cases.

Actions Upon Contracts

Either the county of defendant's residence, or the county where the contract was to be performed, is the proper county for the trial of the action, and if plaintiff chooses either of those counties, defendant may not have it removed, except as stated in the last part of section 93-2904, it is still subject to the power of the court to change the place of trial as provided by subdivisions 2, 3 and 4 of this section. *Love v. Mon-O-Co Oil Corp.*, 133 M 56, 319 P 2d 1056, 1059.

Application of Section

Right of defendant to a change of place of trial to the proper county depends upon the state of plaintiff's original complaint at the time defendants made their first general appearance. *Johnson v. Clark*, 131 M 454, 311 P 2d 772, 777.

Discretion of Court

The word "must," as used in this section, does not mandatorily require the trial judge to grant the motion as a matter of course. *McGraff v. McGillvray*, 135 M 256, 339 P 2d 478.

The matter of granting or refusing a motion for change of venue rests in the sound discretion of the trial court and its decision will be disturbed only when it appears that the court has abused its discretion. *McGraff v. McGillvray*, 135 M 256, 339 P 2d 478; *Little v. Strobel*, — M —, 346 P 2d 971.

Where the evidence relating to the issue of whether a fair trial may be had in the county is conflicting, there is ordinarily no basis for a finding that the trial court abused its discretion in denying the motion. *McGraff v. McGillvray*, 135 M 256, 339 P 2d 478.

In an action for wrongful death in behalf of the heirs of a deceased murder victim against the estate of the alleged killer, where the facts indicating prejudice on the part of the public were denied and there was no activity indicating any prejudice, the trial court did not abuse its discretion in denying executor's motion for a change of venue. *McGraff v. McGillvray*, 135 M 256, 342 P 2d 736.

Effect of Motion

A motion seeking a change of venue under this section is not a defense within the meaning of section 93-2824 [now superseded by section 93-2704-9]. *McGraff v. McGillvray*, 135 M 256, 342 P 2d 736.

Operation and Effect

This section and section 93-901 are companion sections and must be construed together. *State ex rel. Coleman v. District Court*, 120 M 372, 186 P 2d 91, 94.

This section cannot become applicable until the district judge has complied with section 93-901. *State ex rel. Coleman v. District Court*, 120 M 372, 186 P 2d 91, 94.

Power of Substituted Judge

Subdivision 4 of this section and section

93-310 give a judge called in under the provisions of section 93-901 the authority to draw additional jurors from jury box No. 3 for the remainder of the term under the provisions of section 93-1510. *State v. Hay*, 120 M 573, 194 P 2d 232, 234, distinguished in 242 P 2d 985.

Provisions Are Mandatory

The provisions of this section are mandatory and on timely and proper application, require the district court to change the venue. *Johnson v. Clark*, 131 M 454, 311 P 2d 772, 776.

Rights of Executor

An executor, like any other defendant, may have a change of place of trial under this section upon a proper showing that "there is reason to believe that an impartial trial cannot be had." *McGraff v. McGillvray*, 135 M 256, 342 P 2d 736.

Time for Making Decision

Until defendant has answered, any action of the court in determining a motion for a change of venue under subd. 3 is premature. *McNeill v. McNeill*, 122 M 413, 205 P 2d 510, 512.

Where divorce action was not brought in the county of the residence of the defendant and defendant appeared by general demurrer and demand that the action be transferred to the county of his residence, it was error for the court to refuse the transfer since the court could not be given such authority to retain jurisdiction in such county by subd. 3 of this section prior to the disposition of the demurrer and the answer of defendant. *McNeill v. McNeill*, 122 M 413, 205 P 2d 510, 511.

References

Cited in *State ex rel. McVay v. District Court*, 126 M 382, 251 P 2d 840, 848.

93-2908. (9100) Papers to be transmitted—costs and fees—jurisdiction.

References

Cited or applied in *Fraser v. Clark*, 128 M 160, 273 P 2d 105, 114.

93-2910. (9102) Change of place of trial on agreement of parties.

Stipulation in Contract

Assignee of contract is bound by stipulation as to venue. *Electrical Products Consolidated v. Bodell*, 132 M 243, 316 P 2d 788, 791.

Parties have a right to stipulate in advance where any action arising under a contract may be tried. *Electrical Products Consolidated v. Bodell*, 132 M 243, 316 P 2d 788, 790.

CHAPTER 30—MANNER OF COMMENCING CIVIL ACTIONS —SERVICE OF SUMMONS

Section 93-3008. Service of summons on certain corporations—made on secretary of state.

93-3009. When and how service is made—fee for service.

93-3010. Duty of secretary of state.

93-3001. (9105) Actions—how commenced.**References**

Cited or applied in *Wilson v. Wilson*, 128 M 511, 278 P 2d 219, 223.

93-3002. (9106) Complaint—how indorsed, etc.**References**

Cited or applied in *Kujich v. Lillie*, 127 M 125, 260 P 2d 383, 385.

93-3003. (9107) Repealed.**Repeal**

This section (Sec. 68, p. 54, L. 1877), relating to form and contents of the summons, was repealed by Sec. 84, Ch. 13,

Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2702-2 and 93-2703-6(a).

93-3004. (9108) Alias summons—manner and time of issuing.**References**

Cited or applied in *Kujich v. Lillie*, 127 M 125, 260 P 2d 383, 388.

93-3005. (9109) Notice of the pendency of an action, etc.**Affirmative Defenses**

Affirmative defenses are not necessarily claims for affirmative relief as contemplated by this section. *White v. Connor*, — M —, 354 P 2d 722, 731.

References

Cited or applied in *Emery v. Emery*, 122 M 201, 200 P 2d 251, 265.

93-3006, 93-3007. (9110, 9111) Repealed.**Repeal**

These sections (Secs. 28, 29, pp. 139, 140, L. 1867; Sec. 5, p. 75, L. 1869; Sec. 20, p. 54, L. 1874; Secs. 71, 72, p. 56, L. 1877; Sec. 1, Ch. 175, L. 1937; Sec. 1, Ch. 186, L. 1939), relating to service and return of summons, were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2702-2.

References

Cited in *Montana Valley Land Co. v. Bestul*, 126 M 426, 253 P 2d 325, 328; *Bentley v. Rosebud County*, 230 F 2d 1; *Graham & Ross Mercantile Co. v. Sprout, Waldron & Co.*, 174 F Supp 551.

93-3008. (9112) Service of summons on certain corporations—made on secretary of state. When an action is pending in any court in this state against a corporation organized under the laws of this state, or against a corporation organized under the laws of any other state or country, that has filed a copy of its charter in the office of the secretary of state of Montana and qualified to do business in this state; or against a corporation organized under the laws of any other state or country that is actually doing business within the state of Montana or that was actually doing business within this state at the time the said action arose even though such corporation has not filed a copy of its charter in the office of the secretary of state of Montana and has not qualified to do business in this state; or against a national banking corporation who, through insolvency or lapse of charter has ceased to do business in Montana; upon any cause of action arising within this state, and the president or other head, secretary, cashier, or managing agent of such domestic corporation, or the business agent, cashier, secretary, or agent appointed to receive service of process by such corporation organized under the laws of any other state or country,

or any clerk, superintendent, general agent, cashier, principal director, ticket agent, stationkeeper, managing agent, or other agent, having the management, direction, or control of any property of any corporation doing business in this state, cannot be found, upon which service of process can be made, and an affidavit is filed in the office of the clerk of the court in which the action is pending, setting forth that an action is pending in that court, and that the plaintiff has a good cause of action upon the merits, and that such corporation is a necessary party therein, and that none of the persons or officers above named can be found within the state, upon whom service of process can be made, the clerk of the court shall make an order directing process to be served upon the secretary of state of the state of Montana, or, in his absence from his office, upon the deputy secretary of state of the state of Montana; provided, however, that when service of process is made under the provisions of this section in actions and proceedings in which personal service of summons is not required to be made in order to obtain relief, including every action or proceeding commenced in this state to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance, or lien, or cloud, upon the title of real or personal property within this state, service by publication must also be made.

History: En. Sec. 1, Ch. 37, L. 1917; re-en. Sec. 9112, R. C. M. 1921; amd. Sec. 1, Ch. 135, L. 1949; amd. Sec. 1, Ch. 122, L. 1951.

Amendments

The 1949 amendment inserted the words "or against a national banking corporation who, through insolvency or lapse of charter has ceased to do business in Montana."

The 1951 amendment inserted the words appearing between the first and second semi-colons relating to corporations not having qualified to do business in the state and added the proviso.

Repealing Clause

Section 2 of Ch. 135, L. 1949 repealed all acts and parts of acts in conflict therewith.

Effective Date

Section 3 of Ch. 135, L. 1949 provided the act should be in effect upon its passage and approval. Approved March 1, 1949.

Doing Business within State

Corporation, which manufactured automobiles and had its principal place of business in Ohio was not doing business within the state for purposes of service of process where it was shown that the corporation had no agents or property in the state, and that it sold its automobiles and parts to distributors in Ohio who in turn sold them to dealers. Representatives from the corporation visited distributors and dealers but their business was to note and report the manner in which

the distributors and dealers conduct the business. *Clapper Motor Co. v. Robinson Motor Co.*, 119 F Supp 79.

Where the activities of the defendant foreign corporation, which did not have a contract with the plaintiff, involved sending a representative into the state to perform engineering services for the improvement of its feed mill and sending representatives into the state for consultation after machinery sold to and installed by another for plaintiff failed to function properly, such action by defendant did not amount to "doing business" in the state. *Graham & Ross Mercantile Co. v. Sprout, Waldron & Co.*, 174 F Supp 551.

Sufficiency of Affidavit

Affidavit that affiant was unable to locate "the President, Vice President, Cashier or other officer of the said defendants upon whom service could be made, and that there is no such agent or officer of said corporation in the State of Montana upon whom service could be had" was in substantial compliance with the requirements of the statute. *Hinton v. Staunton*, 124 M 534, 228 P 2d 461, 465.

References

Cited or applied in *Malcom v. Stondall Land & Investment Co.*, 129 M 142, 284 P 2d 258, 259.

Who is "agent authorized by appointment" to receive service of process within purview of Federal Rules of Civil Procedure and similar state rules and statutes. 26 ALR 2d 1086.

93-3009. (9113) When and how service is made—fee for service. When such order is made, the summons and complaint, together with a copy of such order, shall be served upon the secretary of state of the state of Montana, or, in his absence from his office, upon the deputy secretary of state, by delivering to and leaving with him a true copy of the summons and complaint, and a copy of such order, and shall likewise pay to the said secretary a fee of five dollars (\$5.00), which shall be covered into the state treasury by him, and may be taxed as costs by the plaintiff.

History: En. Sec. 2, Ch. 37, L. 1917; re-en. Sec. 9113, R. C. M. 1921; amd. Sec. 17, Ch. 117, L. 1961.

Repealing Clause

Section 18 of Ch. 117, Laws 1961 repealed all acts and parts of acts in conflict therewith.

Amendment

The 1961 amendment increased the fee chargeable by the secretary of state from \$2.00 to \$5.00.

93-3010. (9114) Duty of secretary of state. Upon such service being so made upon the secretary of state or his deputy, the said secretary of state or his deputy shall promptly mail the copy of summons and complaint, and copy of the order, by registered mail to the address of such corporation, at its principal home office, as shown by the papers on file in the office of the secretary of state, and in the case of corporations which have not qualified to do business within the state, to the principal home office address as supplied by the plaintiff in said action, and shall make out and mail to the clerk of the court in which the action is pending, a certificate of such mailing, which shall have attached thereto the registry receipt for such letter.

History: En. Sec. 3, Ch. 37, L. 1917; re-en. Sec. 9114, R. C. M. 1921; amd. Sec. 2, Ch. 122, L. 1951; amd. Sec. 1, Ch. 151, L. 1953.

Amendments

The 1951 amendment inserted the words "And in the case of corporations which have not qualified to do business within the state, to the principal home office address as supplied by the plaintiff in said action" and added the proviso.

The 1953 amendment deleted the proviso at the end of the section which read "provided that in cases of corporations which have not qualified to do business within, this state service shall not be deemed complete unless the registry receipt shows prima facie that each copy

of summons and complaint and copy of the order was received."

Repealing Clauses

Section 3 of Ch. 122, Laws 1951 and Sec. 2 of Ch. 151, Laws 1953 repealed all acts and parts of acts in conflict therewith.

Effective Dates

Section 4 of Ch. 122, Laws 1951 provided the act should be in effect from and after its passage and approval. Approved February 28, 1951.

Section 3 of Ch. 151, Laws 1953 provided the act should be in effect from and after its passage and approval. Approved March 3, 1953.

93-3011. (9115) Service to be deemed personal.

Operation and Effect

It is competent for the legislature to provide that service on the secretary of state shall constitute personal service on the corporation. *Montana Valley Land Co. v. Bestul*, 126 M 426, 253 P 2d 325, 328.

In the *Rothrock Case* the court distinguished between substituted service and

constructive service. Personal service of process means delivery to the defendant personally. But even in the case of individuals, it is competent for the legislature to give other modes of service the force of personal service. Since a corporation is but an artificial being, it is proper for the legislature to prescribe what shall constitute personal service on

such a being and it is competent for the legislature to provide that service on the secretary of state shall constitute personal service on the corporation. *Montana Valley Land Co. v. Bestul*, 126 M 426, 253 P 2d 325, 328.

93-3013. (9117) Repealed.

Repeal

This section (Sec. 30, p. 140, L. 1867; Sec. 73, p. 57, L. 1877; Sec. 4, p. 9, L. 1881; Sec. 1, p. 50, L. 1883; Sec. 1, Ch. 36, L. 1907; Sec. 1, Ch. 110, L. 1941), relating to publication of summons, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2702-2.

Affidavit Made by Attorney

There is nothing in this section which prevents plaintiff's attorney from either making or filing the affidavit. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 494.

Applicable to Quiet Title Action

This section is made applicable to quiet title actions by section 93-6202. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 495.

93-3014. (9118) Repealed.

Repeal

This section (Sec. 31, p. 140, L. 1867; Sec. 74, p. 57, L. 1877; Sec. 2, p. 50, L. 1883; Sec. 1, Ch. 16, L. 1947), relating

93-3015. (9119) Repealed.

Repeal

This section (Sec. 639, C. Civ. Proc. 1895), relating to contents of a summons for publication, was repealed by Sec. 84,

93-3017. (9121) Repealed.

Repeal

This section (Sec. 75, p. 57, L. 1877), relating to proceedings when only part of the defendants are served, was repealed

93-3018. (9122) Repealed.

Repeal

This section (Secs. 33, 34, p. 141, L. 1867; Secs. 76, 77, p. 58, L. 1877; Sec. 1, Ch. 103, L. 1935), relating to proof of

93-3019. (9123) When jurisdiction of action acquired.

Motion for Change of Venue

The making of a motion for a change of venue constituted an appearance within the meaning of this section and section 93-3103 [now superseded by section 93-2703-1(a)], and no default judgment could have been taken. *United States Fidelity*

Personal Judgment

As this section deems service on the secretary of state under section 93-3007 personal service it follows that a personal judgment may be entered on such service. *Montana Valley Land Co. v. Bestul*, 126 M 426, 253 P 2d 325, 328.

Filing Summons and Return Not Condition Precedent

There is no provision which requires that the original summons with the return thereon must first be filed with the clerk of the court before an order of publication may be obtained. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 495.

Specific Performance

A suit for specific performance of a contract to convey real property is a suit in personam and service cannot be had by publication. *State ex rel. Miller v. District Court*, 120 M 423, 186 P 2d 506, 507, 173 ALR 978.

Sufficiency of affidavit as to due diligence in attempting to learn whereabouts of party to litigation, for the purpose of obtaining service by publication. 21 ALR 2d 929.

to publication of summons, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2702-2.

Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2702-2.

by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2702-2D(11).

service of summons and complaint, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2702-2D(9) and (10).

and Guaranty Company v. State, — M —, 345 P 2d 734, 735.

References

Cited or applied in *Kujich v. Lillie*, 127 M 125, 260 P 2d 383, 388.

93-3020. (9124) Return of summons.**Failure to File Original Summons With Return**

Mere failure or omission to file the original summons with the various returns thereon within the time specified in this section does not affect the district court's jurisdiction. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 496.

Failure to Make Return in Time

The court does not lose jurisdiction over a defendant who has been properly served by the failure of the sheriff to make the return within the time required by this section. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 496.

CHAPTER 31—PLEADINGS IN GENERAL

(Repealed—Section 84, Chapter 13, Laws of 1961)

93-3101 to 93-3103. (9125 to 9127) Repealed.**Repeal**

These sections (Sees. 36 to 38, p. 142, L. 1867; Sec. 48, p. 56, L. 1874; Secs. 79 to 81, p. 58, L. 1877), relating to pleadings in general, were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-1(a).

Motion for Change of Venue

The making of a motion for a change of venue constituted an appearance within the meaning of section 93-3019 and section 93-3103, and no default judgment could have been taken. *United States*

Fidelity and Guaranty Company v. State, — M —, 345 P 2d 734, 735.

Operation and Effect

Where a motion for a change of venue was timely served and filed in the action by defendant's attorney, defendant was not in default. *McLeod v. McLeod*, 124 M 590, 228 P 2d 965.

Defendants filing motion to strike portions of plaintiff's complaint made their general appearance in the case. *Johnson v. Clark*, 131 M 454, 311 P 2d 772, 774.

CHAPTER 32—THE COMPLAINT—JOINDER OF ACTIONS

(Repealed—Section 84, Chapter 13, Laws of 1961)

93-3201. (9128) Repealed.**Repeal**

This section (Sec. 82, p. 59, L. 1877), defining the complaint, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-1(a).

References

Cited or applied in *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 999.

93-3202. (9129) Repealed.**Repeal**

This section (Sec. 39, p. 142, L. 1867; Sec. 83, p. 59, L. 1877), relating to the contents of the complaint, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2703-2(a) and (e)(1) and 93-2703-4(a).

Divorce Action

In a divorce action a complaint charging desertion must be sufficiently informative as to matters of time and place of desertion as to reasonably inform the defendant of the charge. *Hosking v. Hosking*, 120 M 437, 186 P 2d 503, 504.

Effect of Allegations on Evidence Admissible

Where complaint alleged the only issue

that defendant was required to meet as the amount of \$2,956 which plaintiff claimed to have earned, it was error to permit plaintiff to testify that there was still \$2,956 due him after he had been paid that much. It confronted defendant with a cause of action not pleaded. *Johns v. Modern Home Crafters, Inc.*, 134 M 76, 328 P 2d 641, 643.

"Last Clear Chance Doctrine"

The doctrine of last clear chance has application to a case not only where defendant actually saw plaintiff in a position of peril in time to avoid the injury by the exercise of reasonable care but also to a case where in the exercise of reasonable care he should or could have discovered plaintiff in his perilous position in time to

avoid the injury. *Sorrells v. Ryan*, 129 M 29, 281 P 2d 1028, 1030.

Legal Conclusions

Statement that the defendant "wrongfully failed to perform his official duty to supply the plaintiff with license blanks" in a suit for damages against the state fish and game warden was a bald conclusion of law and insufficient to withstand general demurrer. *Meinecke v. McFarland*, 122 M 515, 206 P 2d 1012, 1014.

Pleadings in Actions on Bills and Notes

It is a fundamental rule of pleading in actions on bills and notes that the plaintiff must allege facts showing title or right to sue. In an action by the payee named in the instrument, however, a formal allegation that he is still the owner and holder is unnecessary if the execution of the instrument, its delivery to the plaintiff, and

the default of the maker or acceptor are alleged. *Parkinson v. Diefenderfer*, 128 M 547, 280 P 2d 424.

Statement of Facts in Ordinary and Concise Language

It is not necessary to allege the items constituting an account, but an allegation that an indebtedness is owing from defendant to plaintiff for the balance due on "stumpage from timber purchased of and from the plaintiff" which upon demand the defendant failed and still fails to pay, is sufficient to allege the ultimate facts required to state a cause of action. *Ballenger v. Tillman*, 133 M 369, 324 P 2d 1045, 1049.

References

Cited or applied in *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 999; *Shuey v. Shuey*, 129 M 549, 290 P 2d 1100, 1102.

93-3203. (9130) Repealed.

Repeal

This section (Sec. 64, p. 145, L. 1867; Sec. 84, p. 59, L. 1877; Sec. 1, Ch. 59, L. 1931), relating to the joinder of actions, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2704-2(a).

Action on Group Insurance Policy

In an action on a group insurance policy covering hospital and medical expenses and involving claimed injuries incurred by several employees covered under the policy, the court did not err in overruling the company's motion to require plaintiffs separately to state and number their causes of action, since there was but one contract and the one main issue was simply the existence or nonexistence of the group insurance contract on a certain date. *Cantrell v. Benefit Assn. of Railway Employees*, — M —, 348 P 2d 345, 349.

Divorce

Relief for causes set out in subds. 1, 2, 3 and 4 of this section cannot be joined in an action for a divorce. *Emery v.*

Emery, 122 M 201, 200 P 2d 251, 256, distinguished in 349 P 2d 312.

Failure to Object Waives Right

Where plaintiff failed to move the court to require the defendant to separately state and number causes of action, the objection to the intermingling of separate causes of action was waived. *Pioneer Engineering Works v. McConnell*, 123 M 171, 212 P 2d 641.

Trespass

Where plaintiff is grazing cattle of several other persons on his lands and defendant on two separate occasions commits a trespass against such cattle the causes of action may be joined. *Cormier v. Fraser*, 130 M 170, 296 P 2d 1021.

References

Cited or applied in *Maass v. Patterson*, 122 M 394, 204 P 2d 1040, 1041; *Shaw v. Shaw*, 122 M 593, 208 P 2d 514, 519; *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 995.

CHAPTER 33—DEMURRER TO COMPLAINTS

(Repealed—Section 84, Chapter 13, Laws of 1961)

93-3301. (9131) Repealed.

Repeal

This section (Sec. 40, p. 142, L. 1867; Sec. 85, p. 59, L. 1877), relating to grounds for demurrer, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2703-3(a) and 93-2703-6(b) and (c).

Defect in Parties

Generally, any defect in parties must be taken advantage of by special demurrer or else it is deemed waived, or if the defect of parties does not appear on the face of the complaint then to move for non-suit at the trial. *Ballenger v. Tillman*, 133 M 369, 324 P 2d 1045, 1051.

Facts Sufficient to Constitute a Cause of Action

As actionable negligence arises only from a breach of a legal duty, and a complaint alleged that the defendant owed plaintiff, his employee, the duty of furnishing him a reasonably safe place to work and alleged a breach of the duty by alleging that the defendant failed to provide a reasonably safe place to work and a reasonably safe way to travel to and from a water fountain and rest room, the complaint stated facts sufficient to constitute a cause of action and was good as against the demurrer. *Ritchie v. Northern Pac. Ry. Co.*, 128 M 218, 272 P 2d 728, 729.

Forcible Entry and Unlawful Detainer Actions

The provisions of this chapter, sections 93-3301 to 93-3306, are made applicable to proceedings for forcible entry and unlawful detainer by section 93-9718, since

they are encompassed by and included within sections 93-2301 to 93-8717 as specified in section 93-9718. *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 999.

Waiver of Defects

Where defendants filed a demurrer they thereby waived all defects in the complaint attackable only by motion and therefore motion for bill of particulars was properly overruled. *Sheridan Elec. Coop. v. Ferguson*, 124 M 543, 227 P 2d 597, 603.

References

Cited or applied in *State ex rel. Cornwell v. District Court*, 122 M 266, 200 P 2d 706, 709; *Mitchell v. Garfield County*, 123 M 115, 208 P 2d 497, 504; *State ex rel. Reid v. District Court*, 126 M 586, 256 P 2d 546, 550.

Demurrer as setting up defense of bona fide purchase of real property. 33 ALR 2d 1330.

93-3302 to 93-3306. (9132 to 9136) Repealed.**Repeal**

These sections (Secs. 41 to 45, p. 143, L. 1867; Secs. 85, 86, p. 60, L. 1877; Sec. 1, p. 158, L. 1901), relating to demurrers to complaints, were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2703-1(c),

93-2703-3(a), 93-2703-6(b), (e) and (h), and 93-2703-9(a).

References

Cited or applied in *Mitchell v. Garfield County*, 123 M 115, 208 P 2d 497, 504.

CHAPTER 34—ANSWER**93-3401. (9137) Repealed.****Repeal**

This section (Sec. 46, p. 143, L. 1867; Sec. 6, p. 64, L. 1869; Sec. 1, p. 46, L. 1874; Sec. 87, p. 61, L. 1877), relating to contents of the answer, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-2(b) and (c).

Denial of Material Allegations

Where answer denied each and every "material" allegation of the complaint and plaintiff went to trial thereon without objection, each and all allegations in the complaint were material and the plaintiff was required to make proof of such material allegations so pleaded by him. *Maass v. Patterson*, 122 M 394, 204 P 2d 1040, 1045.

Forcible Entry and Unlawful Detainer Actions

The provisions of this chapter, sections 93-3401 to 93-3415, are made applicable to proceedings for forcible entry and unlawful detainer by section 93-9718, since they are encompassed by and included

within sections 93-2301 to 93-8717 as specified in section 93-9718. *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 999.

New Matter Stated

The purpose of this section is to prevent a multiplicity of suits involving the same parties and the same transactions. *Jensen v. Franklin*, 135 M 341, 340 P 2d 832.

Offer to do Equity

An "offer to do equity" in the answer when not accepted as provided in section 93-8201 could not be used in evidence nor could it be regarded as an admission that defendants had waived any of their defenses. *Rachou v. McQuitty*, 125 M 1, 229 P 2d 965.

Waiver of Objections

Objections to the form of denials are waived by going to trial without first challenging the pleading by motion, demurrer or other timely and proper objection. *Maass v. Patterson*, 122 M 394, 204 P 2d 1040, 1045.

References

Cited in *Flathead Lumber Corp. v.*

Everett, 127 M 291, 263 P 2d 376, 381 (dissenting opinion).

93-3402. (9138) Repealed.**Repeal**

This section (Sec. 47, p. 143, L. 1867; Sec. 88, p. 61, L. 1877), defining a counterclaim, was repealed by Sec. 84, Ch. 13,

Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-7(b) and (c).

93-3404, 93-3405. (9140, 9141) Repealed.**Repeal**

These sections (Secs. 693, 694, C. Civ. Proc. 1895), relating to judgment on a counterclaim, were repealed by Sec. 84,

Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-7(c).

93-3408. (9144) Repealed.**Repeal**

This section (Sec. 89, p. 61, L. 1877), relating to omission by defendant to set up counterclaim, was repealed by Sec. 84,

Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-7(a).

93-3409. (9145) Counterclaim not barred by death or assignment.**References**

Cited or applied in *Hagerty v. Hall*, 135 M 276, 340 P 2d 147, 149.

93-3410. (9146) Repealed.**Repeal**

This section (Sec. 49, p. 143, L. 1867), relating to defenses and counterclaims set forth in the answer, was repealed by Sec.

84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2703-2(b) and (c)(2) and 93-2703-4(b).

93-3411, 93-3412. (9147, 9148) Repealed.**Repeal**

These sections (Secs. 700, 701, C. Civ. Proc. 1895), relating to partial defenses, and to defendant's demand for affirmative judgment, were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-2(a) and (b).

Burden of Proof

Matter in mitigation of damages is a

defense and the burden of pleading and proving it rests with the defendant. *Garden City Floral Co. v. Hunt*, 126 M 537, 255 P 2d 352, 358.

Mitigation of Damages

Matter in mitigation of damages is a defense, and the burden of pleading and proving it rests with the defendant. *Garden City Floral Co. v. Hunt*, 126 M 537, 255 P 2d 352, 358.

93-3415. (9151) Repealed.**Repeal**

This section (Sec. 1, Ch. 177, L. 1919), relating to filing and service of cross-complaints, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2703-7(g) and 93-2703-8(a).

Cross-complaint Proper in Forcible Entry and Unlawful Detainer Actions

This section, included in the Code of Civil Procedure, is made applicable to proceedings for forcible entry and unlawful detainer by sections 93-9707 and 93-9718. *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 995, 998, 999.

Scope of Cross-complaint in Mandamus Proceedings

Intervenors in a mandamus action are not entitled to maintain their cross-complaint unless that cross-complaint relates to, or depends upon, the duties asserted by the plaintiff against the defendant public officer. Thus, where the plaintiff seeks by mandamus to require the recorder of marks and brands to record a brand in his name as administrator whether the intervenors are the owners of the brand, the animals bearing the brand, and of the proceeds of the sale of animals so branded presents a question which bears no relation to the duty of the general recorder

of marks and brands to issue a certificate to the plaintiff. *Benolken v. Miracle*, 129 M 495, 289 P 2d 953, 955.

Interveners by their cross-complaint may not transform a proceeding in mandamus against a public officer into a private dispute between them and the plaintiff to settle disputed property rights which do not relate to, or depend upon, the duty of

the officer against whom the proceeding is brought. *Benolken v. Miracle*, 129 M 495, 289 P 2d 953, 956.

References

Cited or applied in *Reed v. Reed*, 130 M 409, 304 P 2d 590, 593 at 597 (dissenting opinion).

CHAPTER 35—DEMURRER TO ANSWER

(Repealed—Section 84, Chapter 13, Laws of 1961)

93-3501, 93-3502. (9152, 9153) Repealed.

Repeal

These sections (Secs. 90, 91, p. 62, L. 1877), relating to demurrers to answers, were repealed by Sec. 84, Ch. 13, Laws

1961, effective January 1, 1962. For new provisions, see secs. 93-2703-1(c) and 93-2703-6(b).

93-3503 to 93-3506. (9154 to 9157) Repealed.

Repeal

These sections (Secs. 712 to 715, C. Civ. Proc. 1895), relating to demurrers to answers, were repealed by Sec. 84, Ch. 13,

Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2703-1(c), 93-2703-3(a), and 93-2703-6(b).

CHAPTER 36—REPLY

(Repealed—Section 84, Chapter 13, Laws of 1961)

93-3601. (9158) Repealed.

Repeal

This section (Sec. 1, p. 142, L. 1899; Sec. 1, Ch. 5, L. 1905), relating to contents and time for filing of replies, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-1(a).

Function of Reply—When Allegations Constitute Departure From Complaint

In action for specific performance of contract for assignment of leases in which defense was impossibility of performance because leases had been terminated when defendant entered into contract with

owner of land for purchase, a reply admitting such termination of the leases and praying for the assignment of such contracts of purchase was an abandonment of the original cause of action and sought to enforce a different contract and therefore could not be the basis for any recovery. *Rachou v. McQuitty*, 125 M 1, 229 P 2d 965.

References

Cited in *Flathead Lumber Corp. v. Everett*, 127 M 291, 263 P 2d 376, 381 (dissenting opinion).

93-3602. (9159) Repealed.

Repeal

This section (Sec. 721, C. Civ. Proc. 1895), relating to contents and form of a reply, was repealed by Sec. 84, Ch. 13,

Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2703-2(e)(2) and 93-2703-4(b).

93-3603. (9160) Repealed.

Repeal

This section (Sec. 2, p. 143, L. 1899), relating to failure to reply to counterclaim, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2703-1(a) and 93-2707-2(d).

References

Quoted in the dissenting opinion in *Flathead Lumber Corp. v. Everett*, 127 M 291, 263 P 2d 376, 382.

93-3604. (9161) Repealed.**Repeal**

This section (Sec. 723, C. Civ. Proc. 1895), relating to demurrer to reply, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provi-

sions, see secs. 93-2703-1(e) and 93-2703-6(b).

References

Zier v. Osten, 135 M 580, 342 P 2d 1076.

CHAPTER 37—VERIFICATION OF PLEADINGS**93-3701. (9162) Repealed.****Repeal**

This section (Sec. 51, p. 144, L. 1867; Sec. 93, p. 62, L. 1877), relating to subscription of pleadings, was repealed by

Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-5.

93-3702. (9163) Verification of pleadings.**References**

Cited or applied in *State ex rel. Bergland v. Bradley*, 124 M 434, 225 P 2d

1024; *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 494.

CHAPTER 38—GENERAL RULES OF PLEADING**93-3801. (9164) Repealed.****Repeal**

This section (Sec. 70, p. 147, L. 1867), relating to liberal construction of pleadings, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-2(f).

Action on Indemnity Bond

In action based upon indemnity bond issued by defendant to indemnify plaintiff against loss from fraud or dishonesty of station agent, allegation in complaint that agent while in possession of money and property belonging to plaintiff, had wrongfully and dishonestly appropriated plaintiff's products and cash money, sufficiently stated a cause of action. *Waite v. Standard Accident Ins. Co.*, 132 M 220, 315 P 2d 989, 992.

Divorce Action

A complaint in a divorce action which does not set forth the elements of the ground for divorce with sufficient certainty to establish them is not aided by this section. *Hosking v. Hosking*, 120 M 437, 186 P 2d 503, 504.

Liberal Construction on Demurrer

A complaint attacked by general demurrer will be held sufficient, although defective in many particulars, if it is alleged in the complaint directly, or by necessary inferences that there are facts showing the plaintiff's primary right and its in-

fringement by defendant. *Miller v. Schrock*, 135 M 409, 340 P 2d 154.

Partnership Allegations

In a claim and delivery action brought to recover partnership property belonging to a partnership which was dissolved by express will of the partners, a complaint alleging the existence of the partnership, the subsequent dissolution and that the defendants wrongfully acquired possession of the partnership property involved, was sufficient to show the plaintiff's right to possession and to state a cause of action. *Rykken v. Black*, — M —, 348 P 2d 998.

Relief Requested

In divorce action where complaint alleged that \$2,040 which had been in bank was plaintiff's separate property, that it was placed in her name although she had no interest in it and that she took the money without plaintiff's consent and prayer was for "such other and further relief as to the court may seem meet and equitable in the premises," it was not error for the court to adjudge that plaintiff recover from defendant the amount of \$2,040. *Rogers v. Rogers*, 123 M 52, 209 P 2d 998, 1001, distinguished in 354 P 2d 186; explained in 323 P 2d 608.

References

Cited or applied in *Manning v. Zeiler*, 127 M 248, 261 P 2d 807, 808.

93-3802, 93-3803. (9165, 9166) Repealed.**Repeal**

These sections (Secs. 741, 742, C. Civ. Proc. 1895), relating to frivolous, sham, and irrelevant pleadings, were repealed by

Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-6(f).

93-3804. (9167) Account—how pleaded.**Foreclosure of Mechanic's Lien**

In action to foreclose mechanic's lien and recover a stated sum of money for labor and materials a complaint which did not contain an itemized statement of the materials and labor furnished was not subject to demurrer, but the defendant's remedy was under this section. *Cole v. Hunt*, 123 M 256, 211 P 2d 417, 419.

upon demand the defendant has failed and still fails to pay, is sufficient to allege the ultimate facts required by the code. *Ballenger v. Tillman*, 133 M 369, 324 P 2d 1045, 1049.

Where plaintiff filed a statement of account, in an action for the balance due on stumpage from timber sold to the defendant, findings for the plaintiff based upon the complaint which sufficiently stated a cause of action and which were couched in terms of ultimate facts were sufficient. *Ballenger v. Tillman*, 133 M 369, 324 P 2d 1045, 1049.

Operation and Effect

An allegation that an indebtedness is owing from defendant to plaintiff for the balance due on "stumpage from timber purchased of and from the plaintiff" which

93-3806, 93-3807. (9169, 9170) Repealed.**Repeal**

These sections (Secs. 59, 60, p. 145, L. 1867; Secs. 101, 102, p. 64, L. 1877), relating to pleading of judgments and plead-

ing of condition precedent, were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-3(c) and (e).

93-3808. (9171) Repealed.**Repeal**

This section (Sec. 747, C. Civ. Proc. 1895), relating to pleading of an instrument for the payment of money only, was

repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-2(a).

93-3811. (9174) Repealed.**Repeal**

This section (Sec. 61, p. 145, L. 1867; Sec. 104, p. 65, L. 1877), relating to pleading of private statutes, was repealed by

Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-3(d).

93-3812, 93-3813. (9175, 9176) Repealed.**Repeal**

These sections (Secs. 62, 63, p. 145, L. 1867; Secs. 105, 106, p. 65, L. 1877), relating to pleadings in libel and slander cases, were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-2(a) and (b).

Publication of Libel

Complaint by private corporation for libel was sufficient where it charged that the publication was made of and concerning it. *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F Supp 274, 288, 289.

Joint liability for slander. 26 ALR 2d 1031.

93-3814. (9177) Judgment determining rights between codefendants, etc.**Demand for Relief Necessary**

Fact that a court of equity when once it acquires jurisdiction will grant all the relief necessary to the adjustment of the entire subject of the action is subject to the qualification that when rights between

defendants are involved it is not proper to make determination thereof unless demanded in the pleadings. *Strack v. Federal Land Bank*, 124 M 19, 218 P 2d 1052, 1056.

93-3815. (9178) Repealed.**Repeal**

This section (Sec. 65, p. 146, L. 1867; Sec. 107, p. 65, L. 1877), relating to allegations not denied, was repealed by Sec.

84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-2(d).

93-3816. (9179) Repealed.**Repeal**

This section (Sec. 755, C. Civ. Proc. 1895), relating to construction of allegations of insufficient knowledge, was re-

pealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-2(b).

93-3817, 93-3818. (9180, 9181) Repealed.**Repeal**

These sections (Sec. 66, p. 146, L. 1867; Secs. 108, 109, p. 65, L. 1877), defining a material allegation and relating to sup-

plemental pleadings, were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2703-2(d) and 93-2703-9(d).

93-3819. (9182) Repealed.**Repeal**

This section (Sec. 758, C. Civ. Proc. 1895), relating to filing and service of pleadings subsequent to complaint, was re-

pealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2702-3.

93-3820. Repealed.**Repeal**

This section (Sec. 1, Ch. 16, L. 1953), was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-4(c).

This section, as enacted in 1953, read as follows: "Statements in a pleading may

be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

CHAPTER 39—VARIANCE—AMENDMENTS—MISTAKES IN PLEADING**93-3901. (9183) Repealed.****Repeal**

This section (Sec. 110, p. 66, L. 1877), relating to material variances between allegations and proof, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-9(b).

Immaterial Variance

A variance which does not mislead a defendant to his prejudice is insufficient to warrant the granting of a motion for nonsuit. *Arrow Agency v. Anderson*, — M —, 355 P 2d 929, 934.

References

Cited or applied in *Bennett v. Dodgson*, 129 M 228, 284 P 2d 990, 995.

93-3902 to 93-3904. (9184 to 9186) Repealed.**Repeal**

These sections (Secs. 111 to 113, p. 66, L. 1877), relating to variances in and amendments of pleadings, were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-9(a) and (b).

References

Cited or applied in *Bennett v. Dodgson*, 129 M 228, 284 P 2d 990, 995.

93-3905. (9187) Repealed.**Repeal**

This section (Sec. 68, p. 146, L. 1867; Sec. 114, p. 66, L. 1877), relating to amend-

ment of pleadings, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-

2702-4(b), 93-2703-9(a), 93-2707-2(c), and 93-2707-7.

Amendments by Leave of Court

Affirmative Showing of Abuse of Discretion Must be Made to Reverse Lower Court

The allowance or denial of leave to amend a pleading during the course of a trial is within the sound discretion of the trial court and in the absence of an affirmative showing of abuse of discretion the supreme court will not disturb the order of the trial court. *Betor v. Chevalier*, 121 M 337, 193 P 2d 374, 378.

Amendments Allowed

Date of Amendment

Trial court may permit defendants to make amendments to their answer on the date set for trial. *Union Interchange, Inc. v. Parker*, — M —, 357 P 2d 339, 341.

To Add Defendant in Condemnation Proceeding

In a condemnation proceeding, the condemnor should be permitted to add a necessary party defendant after an appeal has been perfected by the condemnor from an assessment by the commissioners. The assessment by the commissioners is not a judgment but merely an award by the lay commissioners of damages contained in their report. *State ex rel. State Highway Comm. v. District Court*, — M —, 348 P 2d 132.

To Substitute Real Party in Interest

In action to quiet title, court was authorized, after default of original defendant, to set aside default and permit assignee of timber rights to be substituted as the party defendant. *State ex rel. Hilyard v. District Court*, 120 M 342, 184 P 2d 997.

When Amendment Properly Refused

After plaintiff had put in his proof and rested his case and defendant introduced some evidence in support of his defense, the court cannot be said to have abused its discretion in refusing an amendment to the answer which would have materially changed the issues. *Betor v. Chevalier*, 121 M 337, 193 P 2d 374, 378.

Trial court did not abuse its discretion in denying motion to amend answer made at the opening of the trial without prior notice, nearly six months after the original answer had been filed. *Kraus v. Newman*, — M —, 352 P 2d 261, 262.

District court's refusal of leave to amend complaint, after such permission had been granted twice without avail, was

not an abuse of discretion. *Tillinger v. Frisbie*, — M —, 353 P 2d 645, 647.

Discretion of Court

When a motion to quash is sustained, it is within the discretion of the trial court either to allow an amendment or to give judgment forthwith. *State ex rel. Walker v. Board of Comrs.*, 120 M 413, 187 P 2d 1013, 1016, distinguished in 158 F Supp 246.

Extending Time for Filing Demurrer

Where motion to strike complaint was overruled and court ordered defendant to answer, defendant could, if he felt that the order prejudiced him in not permitting him to demur to the complaint, request the court for permission to file a demurrer under the provisions of this section and if he fails to do so he waives his right to demur. *Betor v. Chevalier*, 121 M 337, 193 P 2d 374, 376.

Inapplicability Where Party Fails to Present Bill of Exceptions within time Limit

Where a party fails to present his bill of exceptions within the time limit prescribed by section 93-5505, he may not rely upon this section for relief. Non-action is not the equivalent of a "proceeding taken against" the party and since this section is a general one while sections 93-5505 and 93-8708 are specific and pertain to bills of exceptions, the latter sections control under the well-settled rule of construction in this state that the provisions of a special statute control those of a general statute relating to the same subject-matter. *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 992, 994, 995.

Operation and Effect

This court has repeatedly declared that default judgments are not favored and that it is the policy of the law to have every case tried on its merits. While slight abuse of discretion in refusing to set aside a default judgment is sufficient to justify a reversal of the order, only in exceptional cases will this court disturb the action of a trial court in re-opening a default. *Waggoner v. Glacier Colony of Hutterites*, 127 M 140, 258 P 2d 1162, 1168.

Trial court erred in refusing to set aside a default judgment entered after defendant's failure to answer, where evidence disclosed that defendant after being served with process went to see the plaintiff's lawyer and not finding him in talked with an associate who promised to relay defendant's message to him to the effect that the plaintiff was suing the wrong colony, and there was confusion over

what was told to the defendant. Waggoner v. Glacier Colony of Hutterites, 127 M 140, 258 P 2d 1162.

Trial court was correct in setting aside a default judgment against the defendant entered in a divorce decree, where it was disclosed that at the time plaintiff instituted the divorce action in Montana there was pending a divorce action by defendant against plaintiff in California and to which plaintiff had filed a cross-complaint. Petrol v. Petrol, 127 M 184, 259 P 2d 338.

Relief From Judgments, Orders, or Other Proceedings

Amended Application After Motion to Quash Sustained

Where order sustained motion to quash and dismissed action it amounted to a judgment which could be set aside by complying with this section and the provisions of this section can not be avoided by filing an amended application on the theory the order on such amended application for a writ of certiorari is by implication an order to set aside the judgment of dismissal and granting leave to amend. State ex rel. Walker v. Board of Comrs., 120 M 413, 187 P 2d 1013, 1017, distinguished in 158 F Supp 246.

Default Judgments

A party defendant, on application to set aside his default, must, in addition to excusing his delinquency, support the motion by an affidavit of merits setting forth the facts constituting his defense. Holen v. Phelps, 131 M 146, 308 P 2d 624, 627.

In ruling on a motion to set aside a default, the affidavits of merits filed by the petitioner cannot be controverted by counter affidavits. The court confines itself to an investigation of the affidavit of merits to see whether a prima facie defense is made out. Holen v. Phelps, 131 M 146, 308 P 2d 624, 627.

Where defendant alleged that he was owner of the record title in his motion to set aside a default and in his affidavit of merits, he has set out a prima facie defense in view of section 93-2507 which provides that the person establishing legal title is presumed to be in possession. Holen v. Phelps, 131 M 146, 308 P 2d 624, 627.

While the supreme court will disturb the action of a trial court in opening default only in exceptional cases, "no great abuse of discretion by the trial court in refusing to set aside a default need be shown to warrant a reversal." Holen v. Phelps, 131 M 146, 308 P 2d 624, 627.

Affidavit to the effect that defendant's attorney mistakenly believed that papers were served on his client the same day the client delivered them to his office was

a sufficient showing of excusable neglect to justify setting aside of default judgment. Worstell v. DeVine, 135 M 1, 335 P 2d 305.

A court of general jurisdiction has the right, entirely independent of statute, to grant relief against a judgment obtained by extrinsic fraud, and may grant that relief either on motion in the original cause or upon a separate equity suit, and after the period prescribed by this section. Cure v. Southwick, — M —, 349 P 2d 575, 579.

Default judgments are not favored. Although slight abuse of discretion in refusing to set aside a default judgment is sufficient to justify a reversal, only in exceptional cases will the supreme court disturb the action of a trial court in reopening a default. Cure v. Southwick, — M —, 349 P 2d 575, 580.

When a motion to set aside a default judgment is made and is supported by a showing which leaves the court in doubt or upon which reasonable minds might reach different conclusions, the doubt should be resolved in favor of the motion. Cure v. Southwick, — M —, 349 P 2d 575, 580.

The trial court did not err in granting a motion to vacate a default judgment where the defendant made a showing that plaintiff gave him the impression that the matter involved would not be pressed and that he had, therefore, made no appearance on account of his impression. Simons v. Keller, — M —, 350 P 2d 366.

The party applying for relief under this section must make a proper and adequate showing, wherein he sets forth the particular facts and circumstances constituting the mistake, inadvertence, surprise, or excusable neglect upon which he relies. White v. Connor, — M —, 354 P 2d 722, 729.

Where default was taken against the defendant on May 15, 1956 and judgment was entered on July 31, 1957, motion to vacate the default came too late where it was not prepared, served and filed until January 24, 1958. Schalk v. Bresnahan, — M —, 354 P 2d 735, 736.

Where the affidavit of counsel reveals that the only reason for failure to enter an appearance was forgetfulness because of other more important business, such a reason is inexcusable. Schalk v. Bresnahan, — M —, 354 P 2d 735, 736.

Fraud—Probate Proceedings

This section does not provide for setting aside a judgment because of fraud, and while such relief on such ground may be available in a court of equity it is not obtainable in a court of probate. State ex rel. Sanford v. District Court, 124 M 429, 225 P 2d 866, 868.

Variance

Where, in action to recover value of use and occupancy, plaintiff claimed damages measured on a certain basis, and defendant denied that it had any rental value, the fact that a different rental value than that alleged in the complaint was proved was not a material variance. *Pritchard Petroleum Co. v. Farmers Co-op. Oil & Supply Co.*, 121 M 1, 190 P 2d 55, 60.

References

Cited or applied in *State ex rel. Doyle v. District Court*, 126 M 615, 245 P 2d 382; *Flathead Lumber Corp. v. Everett*, 127 M 291, 263 P 2d 376, 382 (dissenting opinion); *Malcom v. Stondall Land & In-*

vestment Co., 129 M 142, 284 P 2d 258, 261; *In re Hofmann's Estate*, 132 M 387, 318 P 2d 230, 235; *Central Montana Stockyards v. Fraser*, 133 M 168, 320 P 2d 981, 985, 988; *Brion v. Brown*, 135 M 356, 340 P 2d 539, 542; *Westfall v. Motors Insurance Corp.*, — M —, 348 P 2d 784, 785.

Reliance by employee codefendant on promise or assumption that employer would defend in employee's behalf as ground for vacation of default judgment. 16 ALR 2d 1139.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant. 20 ALR 2d 1179.

93-3907. (9189) Repealed.**Repeal**

This section (Sec. 776, C. Civ. Proc. 1895), relating to amendment after demurrer, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-1(c).

93-3908. (9190) Suing a party by a fictitious name—when allowed.**Operation and Effect**

It is sufficient to describe a party by any known and accepted abbreviation of

References

Zier v. Osten, 135 M 484, 342 P 2d 1076.

his Christian name. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 497.

93-3909. (9191) Repealed.**Repeal**

This section (Sec. 71, p. 147, L. 1867; Sec. 117, p. 67, L. 1877), relating to immaterial errors and defects, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2703-2(f), 93-2703-9(b), and 93-2707-8.

Annexation of City

In taxpayers' suit opposing annexation of a city subdivision where trial court found that less than the required majority had protested, it must be presumed on appeal, that the lower court's proceedings are regular and contain no substantial error until otherwise shown preponderantly by the plaintiff. *Kunesh v. Great Falls*, 132 M 285, 317 P 2d 297, 298.

Error Not Presumed

Where trial court observed the witnesses, the jury found for the plaintiff, new trial was brief, argued, considered at length and denied, the supreme court on appeal will reverse only for manifest cause; an appeal presumes no error. *Thompson v. Mattuschek*, 134 M 500, 333 P 2d 1022, 1025, 1026.

Excessive Verdict

Where verdict of jury was for ten dol-

lars more than proof showed loss to be and there was no conflict in the evidence, the judgment entered on such verdict would not be reversed but the judgment would be modified by reducing it by ten dollars. *Miller v. Emerson*, 120 M 380, 186 P 2d 220.

Foreclosure Judgment

In an action for money had and received, where the jury verdict and judgment were in strict conformity to the prayer of the complaint, even though there was an additional order merging a note and mortgage changing the nature of the judgment from one of common count for money had and received to one of foreclosure, the judgment could be corrected by the supreme court without a new trial. The status of the parties advanced at the trial would not be affected. *Puterbaugh v. Ash*, 135 M 463, 342 P 2d 742.

Not Applicable Where Jurisdiction Has Not Been Acquired

This section has no application where jurisdiction is wanting. *In re Woodside-Florence Irr. Dist.*, 121 M 346, 194 P 2d 241, 254.

Not Applicable Where Right to Trial by Jury Involved

The provisions of this section are not

applicable where the substantial right of the litigants to have a fair trial before an impartial judge is involved. In *re* Woodside-Florence Irr. Dist., 121 M 346, 194 P 2d 241, 254.

Operation in General

Where defendant in divorce action admitted that certain stocks in her name belonged to plaintiff and that she would indorse them and turn them over to plaintiff if produced, any error in the order of the court quieting title to the stock in plaintiff and ordering defendant to transfer and convey the stock to plaintiff was harmless. *Rogers v. Rogers*, 123 M 52, 209 P 2d 998, 1000, explained in 323 P 2d 608.

Where, on appeal from a verdict in his favor, many of plaintiff's assignments of error related to instructions dealing only with matters affecting the question of liability and since their adoption or refusal could not have prejudiced the plaintiff, the jury having found in his favor, the instructions could not be considered on appeal. *Dasinger v. Andersen*, — M —, 347 P 2d 747, 749.

References

Cited or applied in *Koger v. Halverson*, 125 M 560, 242 P 2d 273, 275; *Flathead Lumber Corp. v. Everett*, 127 M 291, 263 P 2d 376, 384 (dissenting opinion); *Hartse v. Korneychuk*, 131 M 530, 312 P 2d 795, 797; *State v. Peterson*, 134 M 52, 328 P 2d 617, 629.

93-3910. (9192) Time for amendment, answer or reply, etc.

Operation and Effect

Where a motion for a change of venue was timely served and filed in the action

by defendant's attorney defendant was not in default. *McLeod v. McLeod*, 124 M 590, 228 P 2d 965.

CHAPTER 41—CLAIM AND DELIVERY OF PERSONAL PROPERTY

93-4101. (9220) Plaintiff may claim delivery.

References

Cited or applied in *Emery v. Emery*, 122 M 201, 200 P 2d 251, 266; *State ex rel.*

Olsen v. Sundling, 128 M 596, 281 P 2d 499, 501.

93-4102. (9221) Affidavit and its requisites.

Operation and Effect

In such actions it is incumbent on plaintiff to establish by the preponderance of the evidence the right to the immediate possession in himself at the time the action is brought, and that the defendant is

wrongfully in possession. Plaintiff must rely upon the strength of his own right of possession and not upon the weakness of his adversary's claim to such right. *O'Connell v. Haggerty*, 126 M 442, 253 P 2d 578, 580.

93-4120. (9239) Repealed.

Repeal

This section (Sec. 859, C. Civ. Proc. 1895), relating to damages on default, was

repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2707-2(b)(2).

CHAPTER 42—INJUNCTION

93-4201. (9240) Injunction order defined—by whom granted.

Definition—Restraining Order

An order which requires a person to refrain from a particular act for any period of time, no matter what its purpose, is an injunction and this applies to a "restraining order." *Sheridan Elec. Coop. v. Ferguson*, 124 M 543, 227 P 2d 597, 603.

Operation and Effect

An injunction operates only in personam and affects only the parties to the action and a party occupying the relation of a privy who was not a party to the

suit at the time of the rendition of the judgment cannot be held to obey the mandate of the injunction. *Big Four v. Bisson*, 132 M 87, 314 P 2d 863.

References

Cited or applied in *State ex rel. Reid v. District Court*, 126 M 489, 255 P 2d 693, 704; *State ex rel. Thompson v. District Court*, 132 M 53, 313 P 2d 1034, 1037.

Injunctive relief against submission of constitutional amendment, statute, municipal charter, or municipal ordinance, on

ground that proposed action would be unconstitutional. 19 ALR 2d 519.

Decree granting or refusing injunction as res judicata in action for damages in

relation to matter concerning which injunction was asked in first suit. 26 ALR 2d 446.

93-4202. (9241) Injunction—when allowed.

Continued value of restrictive covenant to dominant owner in protection of his property from competition as basis for its enforcement notwithstanding changes in neighborhood conditions. 2 ALR 2d 601.

Relief against union activities as affected by the fact that owner of business operates without outside help or is doing part of the work. 2 ALR 2d 1196.

Injunction by owner or lessee of oil or gas land, or mineral royalty interest therein, in respect of waste. 4 ALR 2d 201.

Right to injunction against flood protection measures as affected by adequacy of remedy at law. 5 ALR 2d 82.

Capacity of taxpayers to maintain suit to enjoin submission of initiative, referendum or recall measure to voters. 6 ALR 2d 557.

Injunction against breach of contract for will or conveyance of property at death in consideration of support or services. 7 ALR 2d 1178.

Adequacy, as regards right to injunction, of the remedy for review of order fixing public utility rates. 8 ALR 2d 839.

Injunctive relief against breach of contract, other than lease or agreement therefor, or contract for services, terminable by one party but not the other. 8 ALR 2d 1208.

Injunction against use by municipality or public of subsurface of street or highway for purposes other than sewers, pipes, conduit wires, and the like. 11 ALR 2d 189, 196, 203, 211, 214.

93-4203. (9242) Injunction—when not allowed.

Enforcement of Criminal Law

An injunction may not be granted to prevent the enforcement of the criminal law. *State ex rel. Olsen v. Horsky*, 122 M 547, 206 P 2d 1157.

Enjoining Enforcement of Board Order

Where the industrial accident board issued an order directing a coal mine to erect a washhouse for its employees in compliance with section 50-435, the coal mine cannot obtain an injunction to enjoin enforcement of the order based on facts which they can assert as a defense to any proceeding brought by the board. *Jeffries Coal Co. v. Industrial Accident Board*, 126 M 411, 252 P 2d 1046, 1047.

Injunction Pendente Lite Regarding Possession of Real Estate

Title or right to possession to real estate may not be litigated in a suit for an in-

junction against peaceful picketing as affected by employer's lack of opportunity to negotiate with union or employees. 11 ALR 2d 1069.

Injunction as remedy of tenant against stranger wrongfully interfering with his possession. 12 ALR 2d 1201, 1208.

Remedy of tenant against stranger for interference with passageway. 12 ALR 2d 1233.

Right of third party in area picketed during labor dispute, who has no connection with the dispute, to an injunction against such picketing. 15 ALR 2d 1396.

Injunction against procuring breach of contract. 26 ALR 2d 1275.

Injunction to protect charitable or eleemosynary corporation against use of same or similar name by another corporation. 27 ALR 2d 961.

Injunction as available to tenant upon landlord's breach of covenant to repair. 28 ALR 2d 473.

Injunction to restrain interference with plaintiff in possession of public office. 34 ALR 2d 560.

Injunction against parking vehicles on private way. 37 ALR 2d 944.

Injunction against pollution of subterranean waters. 38 ALR 2d 1277.

Minority stockholders' right to enjoin further or additional issuance of stock. 38 ALR 2d 1366.

junction. Where there was a lease which was allegedly breached the plaintiff is not entitled to a restraining order preventing the defendants from occupying the land pending a determination of the case on its merits since it was found that the relationship of the parties was one of landlord and tenant and was not a cropping agreement. *Davis v. Burton*, 126 M 137, 246 P 2d 236.

Operation and Effect

Since a private citizen, who does not show that he will be injured in any property or civil right, cannot invoke equitable cognizance of a purely political question, where plaintiff's complaint, in an action seeking an injunction preventing the secretary of state from certifying nominees for a vacancy in the board of railroad commissioners, shows that his only interest is as a taxpaying, private

citizen and prospective absentee voter, he is without standing or capacity to invoke equitable cognizance of a purely political question. *State ex rel. Mitchell v. District Court*, 128 M 325, 275 P 2d 642, 649.

Power to enjoin canvassing votes and declaring result of election. 1 ALR 2d 588.

93-4204. (9243) Injunction order—when granted.

Grounds for Injunction

To entitle an applicant to an injunction he must show not only that he is in danger of losing a substantial right but also that he is in no fault. *Emery v. Emery*, 122 M 201, 200 P 2d 251, 261, distinguished in 349 P 2d 312.

In addition to having a clear right there must also be an apparent and pressing necessity for an injunction, and the injury threatened must be imminent and such as can only be avoided by an injunction. *Emery v. Emery*, 122 M 201, 200 P 2d 251, 261, distinguished in 349 P 2d 312.

Title to Real Property

A wife may not obtain injunction to

Injunction by state court against action in court of another state. 6 ALR 2d 896.

Compelling reinstatement to nonpublic office for employment by mandatory injunction prior to hearing of case. 15 ALR 2d 328.

restrain her husband from selling property when her title to the property is not clear. *Emery v. Emery*, 122 M 201, 200 P 2d 251, 265, distinguished in 349 P 2d 312.

Title to or right of possession of real estate is not triable by injunction. *Emery v. Emery*, 122 M 201, 200 P 2d 251, 267.

Where, in action for injunction, to prevent trespass on land in which plaintiff claimed title to land, defendants in answer claimed title to land involved by adverse possession which plaintiff denied, the pleadings presented the issues of title and ownership which the court had power to determine. *Tiffany v. Uhde*, 123 M 507, 216 P 2d 375.

93-4205. (9244) Injunction order—at what time granted, etc.

Application of Section

This section has no application to proceedings for the abatement of a nuisance under section 94-1001 et seq. *State ex rel. Bergland v. Bradley*, 124 M 434, 225 P 2d 1024.

Operation and Effect

An order to show cause why a divorce decree should not be modified was not sufficiently served where nothing at all was served on the wife and where the wife's mother was served with the first order, but without supporting affidavit. *Hand v. Hand*, 131 M 571, 312 P 2d 990, 993.

Sufficiency of Affidavit

Where restraining order is granted on affidavits they must contain a statement of the material facts essential to establish the applicant's right to the relief sought. *Emery v. Emery*, 122 M 201, 200 P 2d 251, 259, distinguished in 349 P 2d 312.

The requirement that the affidavit should show that sufficient grounds exist for the restraining order is not met by statements of the legal conclusions of the pleader or of mere matters of opinion unsupported by sufficient facts. *Emery v. Emery*, 122 M 201, 200 P 2d 251, 259, distinguished in 349 P 2d 312.

In affidavit for restraining order to prevent defendant in divorce action from molesting plaintiff or entering their home, it was necessary to state facts showing specific improper acts or conduct. *Emery v. Emery*, 122 M 201, 200 P 2d 251, 260, distinguished in 349 P 2d 312.

In affidavit for restraining order to restrain withdrawal of bank funds, statement that "the defendant is addicted to spendthrift and profligate habits" is a bare conclusion and where there are no specific acts alleged, it is insufficient. *Emery v. Emery*, 122 M 201, 200 P 2d 251, 260, distinguished in 349 P 2d 312.

93-4206. (9245) When notice required.

Cross-Reference

See note to sec. 93-4205. *Emery v. Emery*, 122 M 201, 200 P 2d 251.

93-4207. (9246) Security upon injunction.

Consecutive Restraining Orders

Where bond was executed in connection

with granting of temporary restraining order which was thereafter dissolved but

on the same day the judge continued the restraint by another restraining order and continued the bond, the sureties on the original bond were liable for damages sustained through the period of restraint imposed by the second order. *Sheridan Elec. Coop. v. Ferguson*, 124 M 543, 227 P 2d 597, 601.

Consideration for Bond

A bond executed pursuant to and in substantial compliance with this section needs no consideration. *Sheridan Elec. Coop. v. Ferguson*, 124 M 543, 227 P 2d 597, 601.

Measure of Damages

The measure of damages in an action on the injunction bond is the amount which will compensate for all the detriment proximately caused by the injunction during the time it is operative, or which in the ordinary course of things, would be likely to result therefrom. *Sheridan Elec. Coop. v. Ferguson*, 124 M 543, 227 P 2d 597, 601.

Proof of Damages

Where there was evidence as to expenses and attorney's fees in a sum in excess of the amount of the bond, it was error to grant motion for nonsuit but case should have gone to jury. *Sheridan Elec. Coop. v. Ferguson*, 124 M 543, 227 P 2d 597, 601.

93-4208. (9247) Order to show cause.

References

Cited in *State ex rel. Thompson v. District Court*, 132 M 53, 313 P 2d 1034, 1038;

Fact that person suing on bond became obligated for attorney's fees in injunction is sufficiently shown by proof that he employed an attorney who procured a dissolution of the injunction and of the reasonable value of his services. *Sheridan Elec. Coop. v. Ferguson*, 124 M 543, 227 P 2d 597, 602.

Voluntary Dismissal—Action on Bond

Where appeal was taken from action dissolving temporary restraining order and thereafter appellant dismissed his appeal, such dismissal constituted a final adjudication that appellant was not entitled to injunction thereby making the sureties liable. *Sheridan Elec. Coop. v. Ferguson*, 124 M 543, 227 P 2d 597, 600.

What May Be Recovered

Under a bond given in accordance with this section, reasonable expenses are recoverable including attorney's fees and costs of procuring the dissolution of the restraint from the time such restraint was imposed to the final determination thereof. *Sheridan Elec. Coop. v. Ferguson*, 124 M 543, 227 P 2d 597, 602.

References

Cited or applied in *Stalcup v. Cameron Ditch Co.*, 130 M 294, 300 P 2d 511, 513; *Panland v. City of Missoula*, 130 M 635, 304 P 2d 621.

State ex rel. Harrison v. Baker, 135 M 180, 340 P 2d 142, 146.

93-4210. (9249) Verified answer has effect of affidavit.

Effect of Oral Answer

There cannot be a final joining of the issues based on an answer in the form of a general denial orally interposed by counsel upon a hearing to show cause why an abatement order should not issue under the provision of section 94-1002, and a permanent injunction and order of

abatement cannot be ordered. *State ex rel. Harrison v. Baker*, 135 M 180, 340 P 2d 142.

References

Cited in *State ex rel. Thompson v. District Court*, 132 M 53, 313 P 2d 1034, 1038.

93-4211. (9250) Application to dissolve or modify.

Affidavit to Set Aside

Affidavit to set aside temporary injunction granted without notice was not a responsive pleading in answer to complaint in original action to enjoin construction and operation of stock car race track as a nuisance. *State ex rel. Thompson v. District Court*, 132 M 53, 313 P 2d 1034, 1038, distinguished in 335 P 2d 313.

When Modification Not Permissible

Where complaint and affidavits showed prima facie that premises constituted a nuisance per se under section 94-1002, it was error to quash the temporary injunction issued thereunder when defendant filed affidavit under this section and before any hearing on the complaint was had. *State ex rel. Olsen v. 30 Club*, 124 M 91, 219 P 2d 307.

93-4212. (9251) Dissolution or modification.

Dismissal, discontinuance or nonsuit as nullifying previous temporary injunction. 11 ALR 2d 1411.

93-4213. (9252) Costs may be awarded.**Damages**

Where mother brought habeas corpus proceedings to enforce court order awarding custody of child in divorce proceedings

she was entitled to damages under the provisions of this section. *Benson v. Benson*, 121 M 439, 193 P 2d 827, 830.

CHAPTER 43—ATTACHMENT**Section 93-4304. Undertaking.****93-4301. (9256) When attachment may issue.****Divorce Judgment**

A New York divorce judgment is not a contract, express or implied, for the direct payment of money so as to qualify under this section. *Gibson v. Gibson*, — M —, 353 P 2d 344, 348.

Effect of Dissolving Attachment

Where an attachment is dissolved the lien on the property seized thereunder is vacated, the right to hold the property ceases, and the officer holding it should return the same promptly. *Central Montana Stockyards v. Fraser*, 133 M 168, 320 P 2d 981, 995.

Nature of Attachment

The attachment of one person's property to satisfy a claim against another is a conversion of the property. *Central Mon-*

tana Stockyards v. Fraser, 133 M 168, 320 P 2d 981, 989.

When Attachment Not Authorized

Held, that in a contract for the sale of real property wherein there was provided a remedy for and security to the vendors for a breach thereof, this section precluded a rightful attachment and seizure of defendant's personal property. The contract was not one for the direct payment of money and such payments due under the contract were secured by the provisions of the contract. *Fraser v. Clark*, 129 M 56, 282 P 2d 459, 468.

References

Cited or applied in *First Nat. Bank of Plains v. Green Mt. Soil Conservation District*, 130 M 1, 293 P 2d 289, 291.

93-4302. (9257) Affidavit—what to contain.**Security for Note**

Held, a chattel mortgage, which by its terms stated that it was to be security for future advances, was security for a later loan so that attachment was not available in an action for default of a later loan. The chattel mortgage was plain and unambiguous and needed no construction so that parol evidence which tended to vary or alter the terms of the written mortgage

was required to be disregarded. *First Nat. Bank of Plains v. Green Mt. Soil Conservation District*, 130 M 1, 293 P 2d 289.

References

Cited or applied in *Fraser v. Clark*, 129 M 56, 282 P 2d 459, 466.

93-4304. (9259) Undertaking. Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, with two [2] or more sufficient sureties, to be approved by the clerk, in a sum not less than double the amount claimed by the plaintiff, if such amount be one thousand dollars (\$1,000.00) or under, or, in case the amount so claimed by plaintiff shall exceed one thousand dollars (\$1,000.00), then in a sum equal to such amount, but in no case shall an undertaking be required exceeding in amount the sum of ten thousand dollars (\$10,000.00). The condition of such undertaking shall be to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff

was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuing out of the attachment, not exceeding the sum specified in the undertaking. At any time within thirty (30) days after the service of summons, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two (2) days nor more than ten (10) days, must justify before a judge of the district court, or before the clerk thereof, and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment.

History: Ap. p. Sec. 93, p. 61, Bannack Stat.; amd. Sec. 122, p. 156, L. 1867; amd. Sec. 12, p. 65, L. 1869; amd. Sec. 7, p. 75, L. 1870; amd. Sec. 138, p. 54, Cod. Stat. 1871; amd. Sec. 20, p. 56, L. 1874; amd. Sec. 180, p. 82, L. 1877; re-en. Sec. 180, 1st Div. Rev. Stat. 1879; amd. Sec. 6, p. 9, L. 1881; re-en. Sec. 182, 1st Div. Comp. Stat. 1887; en. Sec. 892, C. Civ. Proc. 1895; re-en. Sec. 6659, Rev. C, 1907; re-en. Sec. 9259, R. C. M. 1921; amd. Sec. 1, Ch. 15, L. 1951. Cal. C. Civ. Proc. Sec. 539.

Amendment

The 1951 amendment substituted the words "At any time within thirty (30) days after the service of summons," at the beginning of the third sentence for "Within five days after service of the summons in the action," and in the fifth sentence substituted "ten days" for "five days."

93-4306. (9261) Property subject to attachment.

Liquor License

A retail liquor license is subject to attachment. Stallinger v. Goss, 121 M 437, 193 P 2d 810.

Attachment in action on note or bond not resulting in sale of mortgaged prop-

Repealing Clause

Section 2 of Ch. 15, L. 1951 repealed all acts and parts of acts in conflict therewith.

Effective Date

Section 3 of Ch. 15, L. 1951 provided the act should be in effect from and after its passage and approval. Approved February 2, 1951.

Procedure for Recovery by Defendant

A defendant's cause of action under an attachment bond accrues only when judgment for him in the attachment action has been made, entered, and filed, so his recovery must be by a separate action on the bond rather than being included in the judgment in the original action. Yellowstone Livestock Comm. v. Dupuis, 133 M 454, 325 P 2d 691.

erty, as precluding foreclosure of real estate mortgage. 37 ALR 2d 960.

What constitutes a fraudulently contracted debt or fraudulently incurred liability obligation within purview of statute authorizing attachment on such grounds. 39 ALR 2d 1265.

93-4320. (9273) Property claimed by third persons.

References

Cited in Letz v. Letz, 123 M 494, 215 P 2d 534.

93-4323. (9276) If plaintiff obtains judgment, how satisfied.

Operation and Effect

Held, that where the sheriff of one county held the property in question under a valid writ of attachment and the judgment was rendered and writ of execution directed to the sheriff of another county,

that the sale of property by the sheriff of the former county to satisfy the judgment rendered in the latter county was proper. Stokke v. Graham, 129 M 96, 281 P 2d 1025, 1027.

93-4327. (9280) Proceedings to release attachment—before whom taken.

References

Cited or applied in Fraser v. Clark, 129 M 56, 282 P 2d 459, 466.

93-4328. (9281) Attachment—in what cases it may be released, etc.**Appealable Order**

Fact that motion was to vacate or release attachment rather than to dissolve

the attachment would not prevent the order from being appealable. *Stallinger v. Goss*, 121 M 437, 193 P 2d 810.

93-4329. (9282) When a motion to discharge attachment may be made, etc.**References**

Cited or applied in *Fraser v. Clark*, 129 M 56, 282 P 2d 459, 466.

93-4331. (9284) When writ must be discharged.**Application**

A writ of attachment based upon a fatally defective or erroneous affidavit is improper and irregular. Such writ will be dissolved or discharged when the affidavit

on which it is issued states that the obligation is unsecured whereas it is in fact secured. *First Nat. Bank of Plains v. Green Mt. Soil Conservation District*, 130 M 1, 293 P 2d 289, 292.

CHAPTER 44—RECEIVERS

93-4401. (9301) Appointment of receiver.**Subd. 1.****No Right to Receiver When Action is Based on Sister State Judgment Debt**

In the state of Washington, the plaintiff had a joint interest in the house trailer, but when the divorce decree was rendered, her interest was merged in the Washington decree and judgment. In a suit in Montana, the suit is on the debt created by the judgment, and for the

collection of a judgment debt the relief by receiver does not lie. *Little v. Little*, 125 M 278, 234 P 2d 832, 835.

Appointment of receiver in proceedings arising out of dissolution of partnership or joint adventure, otherwise than by death of partner or at instance of creditor. 23 ALR 2d 583.

CHAPTER 45—DEPOSIT OF MONEY OR PROPERTY IN COURT—ENFORCING ORDER TO CONVEY

93-4501. (9308) Deposit in court.**Right to Relief**

In action to prohibit defendant from cancelling an agreement for sale of lands even though the deposit in court might be insufficient as a tender to defendant, plaintiff might be relieved from forfeiture upon a showing of facts sufficient to appeal to the conscience of a court of equity under section 17-102. *Blackfeet Tribe of*

Blackfeet Indian Reservation v. Klies Livestock Co., 160 F Supp 131, 133, 141.

Tender of Payment of Judgment Refused

Where tender in payment of judgment was refused, payment could not be made by deposit in court. *Galbreath v. Armstrong*, 121 M 387, 193 P 2d 630, 632.

CHAPTER 47—JUDGMENTS IN GENERAL

93-4701. (9313) Repealed.**Repeal**

This section (Sec. 144, p. 161, L. 1867; Sec. 230, p. 95, L. 1877), defining a judgment, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2707-1(a).

Dismissal of Action

In proceeding for writ of certiorari an order sustaining a motion to quash and dis-

missing the proceeding was a judgment. *State ex rel. Walker v. Board of Comrs.*, 120 M 413, 187 P 2d 1013, 1016, distinguished in 158 F Supp 246.

An order dismissing an action is a final judgment from which an appeal can be perfected if the order has the effect of finally determining the rights of the parties. *Kelly v. Harris*, 158 F Supp 243, 244, 247.

Order Denying Petition for Writ of Prohibition

Order of district court denying petition for writ of prohibition to restrain justice court from further proceedings in criminal action was not a judgment. *State ex rel. Aho v. Justice Court of Laurel Township*, 131 M 585, 313 P 2d 542, 543.

Order for an Accounting

An order for an accounting is not a judgment since it is not a final determination of the rights of the parties. It is not final, but is a necessary step to determine what if anything the plaintiff has coming from the defendant. *Corcoran v. Fousek*, 126 M 223, 233 P 2d 1040, 1041.

93-4703. (9315) Repealed.

Repeal

This section (Sec. 146, p. 161, L. 1867; Sec. 232, p. 96, L. 1877), relating to judgments against several defendants, was re-

93-4704. (9316) Repealed.

Repeal

This section (Sec. 147, p. 161, L. 1867; Sec. 233, p. 96, L. 1877), relating to relief granted to the plaintiff, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2707-1(c).

When Court May Exceed Prayer

In divorce action it was not error for

93-4705. (9317) Repealed.

Repeal

This section (Sec. 148, p. 161, L. 1867; Sec. 234, p. 96, L. 1877), relating to grounds for dismissal or nonsuit, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-4(a)(1) and (b).

Entry on Court Minutes

In proceedings in Montana state court where in open court the court granted defendant's "motion to have the case dismissed with prejudice, on its merits," and the clerk recorded this action in the court minutes, the order so entered was a judgment. *Kelly v. Harris*, 158 F Supp 243, 244, 247.

Failure to Enter Judgment

Under subsec. 6 of this section, dismissal must precede the entry of judgment. If the judgment is entered after the expiration of the 6 month period, but before a motion to dismiss is interposed, it is not void, hence not open to collateral attack. *Kelly v. Harris*, 158 F Supp 243, 244, 247.

Order Granting an Injunction

A judgment and order granting an injunction in interpleader action was appealable. *Central Montana Stockyards v. Fraser*, 133 M 168, 320 P 2d 981, 987.

References

Cited or applied in *State ex rel. Reid v. District Court*, 126 M 586, 256 P 2d 546, 551 (dissenting opinion); *State ex rel. Harrison v. Baker*, 135 M 180, 340 P 2d 142, 145.

Entry of final judgment after disagreement of jury. 31 ALR 2d 985.

Conclusiveness of judgment of dismissal in bastardy proceedings. 37 ALR 2d 840.

pealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2707-1 (b).

court to adjudge that plaintiff recover from defendant the amount of \$2,040 which she had withdrawn from the bank although such relief was not requested in the prayer where the prayer asked "for such other and further relief as to the court may seem meet and equitable in the premise." *Rogers v. Rogers*, 123 M 52, 209 P 2d 998, 1001, explained in 323 P 2d 608; distinguished in 354 P 2d 186.

Insufficient Evidence

Whenever there is no evidence in support of plaintiff's case or, where the evidence is so unsubstantial that the court would feel compelled to set aside a verdict, if one should be rendered for the plaintiff, a nonsuit should be granted. *Thompson v. Llewellyn*, — M —, 346 P 2d 561.

Operation and Effect

Where actions were commenced and the summons in each case was issued and served within the period and time limit fixed and allowed by express statutes, the trial court has no "discretion" to disregard the rules of practice and procedure so prescribed and attempt to shorten the time so allowed for the performance of the acts of which the defendant complains. *Kujich v. Lillie*, 127 M 125, 260 P 2d 383, 389.

References

Cited or applied in *Schuster v. Northern Co.*, 127 M 39, 257 P 2d 249, 252.

93-4708. (9320) Repealed.**Repeal**

This section (Sec. 1007, C. Civ. Proc. 1895), relating to the effect of a judgment dismissing the complaint, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-4(b).

Dismissal with Prejudice

A judgment of dismissal may be said to be on the merits when, after plaintiff has lost the right to a dismissal without prejudice because of the filing of a counterclaim, it appears that at the time set for trial he cannot make a case in support of his complaint, and not only fails and refuses to proceed with the presentation of his case but participates in the trial upon defendant's counterclaim. *Schuster v. Northern Co.*, 127 M 39, 257 P 2d 249, 253.

Whether a judgment of dismissal is upon the merits largely depends upon the facts and circumstances of the particular case. *Schuster v. Northern Co.*, 127 M 39, 257 P 2d 249, 253.

In civil action in federal district court the federal court would not go behind a judgment of dismissal entered in state

court and declare that judgment to be something other than it purported to be, i. e., a judgment on the merits, where both the state court minutes and judgment expressly stated that the judgment was on the merits. *Kelly v. Harris*, 158 F Supp 243, 244, 248.

In prior action by pedestrian for injuries sustained when he was hit by vehicle while crossing highway, where motion of dismissal was granted as to defendant and judgment was entered on jury's verdict for codefendant, the judgment on the merits in favor of codefendant was a bar to present action against defendant only. *Willoughby v. Flem*, 158 F Supp 258, 260.

Res Judicata

A judgment of dismissal, wherein it expressly declares on its face that it was rendered on the merits, must be given that effect in a plea of res judicata. *Kelly v. Harris*, 158 F Supp 243, 244, 247.

References

Cited or applied in *State ex rel. Walker v. Board of Comrs.*, 120 M 413, 187 P 2d 1013, 1017.

93-4709. (9321) Repealed.**Repeal**

This section (Sec. 18, p. 54, L. 1874), relating to judgment for costs, was repealed

by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2707-1(d).

CHAPTER 48—JUDGMENT BY DEFAULT

(Repealed—Section 84, Chapter 13, Laws of 1961)

93-4801. (9322) Repealed.**Repeal**

This section (Sec. 150, p. 162, L. 1867; Sec. 236, p. 96, L. 1877; Sec. 1, Ch. 59, L. 1905; Sec. 1, Ch. 28, L. 1939), relating to grounds for judgment by default, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2707-2(a) and (b).

Default Excused

Where defendant's delay in appearing was caused by the service of an alias summons on father and son for the purpose of curing a defect in the original service on the minor, the default judgment was

set aside. *Nelson v. Lennon*, 122 M 506, 206 P 2d 556.

References

Cited or applied in *United States Fidelity and Guaranty Company v. State*, — M —, 345 P 2d 734, 735.

False allegation of plaintiff's domicile for residence in the state as ground for vacation of default decree of divorce. 6 ALR 2d 596.

Granting relief not specifically demanded in pleading or notice in rendering default judgment in divorce or separation action. 11 ALR 2d 340.

CHAPTER 49—ISSUES—MODE OF TRIAL AND POSTPONEMENT—PROCEDURE TO PROCURE JURY TRIAL**93-4901. (9323) Issue defined and the different kinds.****Injunction**

In action by property owners to enjoin

construction and operation of stock car race track as a nuisance, where defendant

filed affidavit to set aside temporary injunction granted without notice and demurrer to complaint, trial court improperly ordered permanent injunction, as the cause

was not at issue and not ready for trial. State ex rel. Thompson v. District Court, 132 M 53, 313 P 2d 1034, 1039, distinguished in 335 P 2d 313.

93-4902. (9324) Repealed.

Repeal

This section (Sec. 152, p. 163, L. 1867; Sec. 238, p. 98, L. 1877), relating to issue of law arising on demurrer, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2703-1(c) and 93-2703-6(b).

References

Cited in State ex rel. Thompson v. District Court, 132 M 53, 313 P 2d 1034, 1039.

93-4903. (9325) Issue of law—how tried.

References

Cited or applied in *Granier v. Chagnon*, 122 M 327, 203 P 2d 982.

93-4904. (9326) Repealed.

Repeal

This section (Sec. 153, p. 163, L. 1867; Sec. 239, p. 98, L. 1877), relating to the manner in which issues of fact arise, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-2(d).

No Answer Filed—Effect

Where, in proceeding for writ of possession to enforce judgment in quiet title action, no answer had been filed, there were no pleadings before the court raising any issue of fact which could be tried by a jury. *Fuller v. Gibbs*, 122 M 177, 199 P 2d 851, 854.

93-4905. (9327) Repealed.

Repeal

This section (Sec. 241, p. 98, L. 1877; Sec. 1, Ch. 61, L. 1939; Sec. 1, Ch. 84, L. 1949), was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-2(a) and (b). For new provisions establishing pretrial procedures similar to those provided for prior to the 1949 amendment of this section, see sec. 93-2703-10.

As amended in 1949, this section read as follows: "In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code."

Pretrial Conference

(The following decisions were decided under the amendment of Ch. 61, L. 1939 and prior to amendment of Ch. 84, L. 1949 which repealed provisions for pretrial conference.)

The permission granted the court to require a pretrial conference does not violate the constitutional guarantee of a jury trial. State ex rel. *Kennedy v. District Court*, 121 M 320, 194 P 2d 256, 260, 2 ALR 2d 1050.

A pretrial conference is not especially for the purpose of disclosure or discovery and the fact that plaintiff furnished defendant with a bill of particulars does not dispense with the reason for a pretrial conference. State ex rel. *Kennedy v. District Court*, 121 M 320, 194 P 2d 256, 263, 2 ALR 2d 1050.

The district court has power to establish by rule a pretrial calendar, and to make the rule effective it is within the power of the court to provide that no jury case shall be set for trial until pretrial conference thereon is had. State ex rel. *Kennedy v. District Court*, 121 M 320, 194 P 2d 256, 260, 2 ALR 2d 1050.

As used in referring to a court calendar the word "calendar" denotes merely a list of cases to be tried. State ex rel. *Kennedy v. District Court*, 121 M 320, 194 P 2d 256, 260, 2 ALR 2d 1050.

Where rule required pretrial conference before setting jury cases for trial it was not required that the rule contain any definite time for the calling of a jury after the pretrial conference. State ex rel. *Kennedy v. District Court*, 121 M 320, 194 P 2d 256, 264, 2 ALR 2d 1050.

Where a rule is adopted under the provisions of this section requiring a pretrial conference before a jury trial, such rule is not revoked in a particular case when the judge of the court is disqualified to act. *State ex rel. Kennedy v. District Court*, 121 M 320, 194 P 2d 256, 260, 2 ALR 2d 1050.

Statement of Issues

Even though a "trial by jury" requires that all material issues of fact be submitted to, and determined by, the jury, this does not require that a statement of

the issues as defined in the pleadings must be given. *Dasinger v. Andersen*, — M —, 347 P 2d 747, 749.

References

Cited or applied in *Little v. Little*, 127 M 152, 259 P 2d 343, 344; *Northern Montana Mustard Growers Co-op. v. Britton*, 128 M 553, 280 P 2d 1078, 1086.

Binding effect of court's order entered after pretrial conference. 22 ALR 2d 599.

93-4906. (9328) Repealed.

Repeal

This section (Sec. 1035, C. Civ. Proc. 1895), relating to separate trials and order of disposing of issues, was repealed by

Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2704-4(b) and 93-2706-5(b).

93-4908. (9330) Repealed.

Repeal

This section (Sec. 242, p. 98, L. 1877), relating to the entry and maintenance of causes on the calendar, was repealed by

Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-3.

93-4909. (9331) Repealed.

Repeal

This section (Sec. 157, p. 163, L. 1867; Sec. 243, p. 98, L. 1877), relating to parties who may bring issues to trial, was repealed

by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-3.

93-4910. (9332) Motion to postpone a trial for absence of testimony, etc.

Abuse of Discretion in Not Granting Continuance

Where plaintiff filed an affidavit for a continuance wherein it was shown that the affidavit was made in good faith, that the absent witness was a material witness; that due diligence was used to procure the witness; and the defendant did not file any affidavits in opposition to the motion, it was an abuse of discretion for the trial court to refuse the continuance. *Dean v. Carter*, 131 M 304, 309 P 2d 1032, 1034.

neglect, then the postponement should be granted. *Westfall v. Motors Insurance Corp.*, — M —, 348 P 2d 784, 785.

Technical Deficiencies in Affidavit

Where a plaintiff's absence was excusable and he did not know that the case was set for trial and plaintiff's counsel did the best he could in setting forth in his affidavit what he believed his client would testify to, the fact that the showing in the affidavit was technically insufficient was not grounds for denying a continuance. *Westfall v. Motors Insurance Corp.*, — M —, 348 P 2d 784.

References

Cited or applied in *State v. Moorman*, 133 M 148, 321 P 2d 236, 241.

93-4912 to 93-4915. Repealed.

Repeal

These sections (Secs. 1 to 4, Ch. 277, Laws 1947), providing for the calling of a jury on request where a civil action was

pending and ready for trial for two years, were repealed by Sec. 2, Ch. 62, Laws 1949. For present provisions, see sec. 93-1501.

CHAPTER 50—TRIAL BY JURY—FORMATION OF JURY—CHALLENGES

Section 93-5011. Challenges for cause.

93-5008. (9341) Ballots—when drawn from box No. 3.**Operation and Effect**

This section which requires the jurors drawn from jury box No. 3 to be discharged at the conclusion of the case has no especial connection with section 93-1510 and does not prevent jurors which are

drawn under the provisions of such section from being drawn to serve for the remainder of the term. *State v. Hay*, 120 M 573, 194 P 2d 232, 234, distinguished in 242 P 2d 985.

93-5010. (9343) Challenge.

Allowance of, or refusal to allow, peremptory challenge after acceptance of juror. 3 ALR 2d 499.

Questioning jurors on voir dire regarding liability insurance in personal injury or death action. 4 ALR 2d 792.

93-5011. (9344) Challenges for cause. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this code to render a person competent as a juror;
2. Consanguinity or affinity within the sixth degree to any party.
3. Standing in the relation of guardian and ward, master and servant, debtor and creditor, employer and clerk, or principal and agent, to either party, or being a member of the family of either party, or a partner in business with either party, or surety on any bond or obligation for either party; provided, however, that a challenge for cause may not be taken because of debtor and creditor relation when the same arises solely by reason of current bills of gas, water, electricity or telephone;
4. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action;
5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation;
6. Having an unqualified opinion or belief as to the merits of the action;
7. The existence of a state of mind in the juror evincing enmity against or bias in favor of either party.

History: En. Sec. 134, p. 70, *Bannack Stat.*; re-en. Sec. 162, p. 164, L. 1867; re-en. Sec. 198, p. 66, *Cod. Stat.* 1871; re-en. Sec. 249, p. 100, L. 1877; re-en. Sec. 249, 1st Div. *Rev. Stat.* 1879; re-en. Sec. 258, 1st Div. *Comp. Stat.* 1887; amd. Sec. 1060, *C. Civ. Proc.* 1895; re-en. Sec.

6741, *Rev. C.* 1907; re-en. Sec. 9344, *R. C. M.* 1921; amd. Sec. 1, Ch. 10, L. 1953. *Cal. C. Civ. Proc.* Sec. 602.

Amendment

The 1953 amendment added the proviso in subsection 3.

93-5012 to 93-5014. (9345 to 9347) Repealed.**Repeal**

These sections (Sec. 163, p. 164, L. 1867; Secs. 250 to 252, p. 101, L. 1877), relating to challenges to the jury, were repealed

by Sec. 84, Ch. 13, *Laws* 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-10(a) and (b).

CHAPTER 51—TRIAL—CONDUCT OF THE TRIAL

Section 93-5101. Order of trial.

93-5101. (9349) Order of trial. When the jury has been sworn, the trial shall proceed in the following order, unless the court, for good cause and special reason, otherwise directs:

1 to 4. * * * [Same as parent volume.]

5. [Repealed.]

6 and 7. * * * [Same as parent volume.]

History: Earlier acts were Sec. 202, p. 67, Cod. Stat. 1871; amd. Sec. 1, p. 41, Ex. L. 1873; amd. Sec. 253, p. 101, L. 1877; re-en. Sec. 253, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 56, L. 1881; re-en. Sec. 262, 1st Div. Comp. Stat. 1887; amd. Sec. 1080, C. Civ. Proc. 1895; amd. Sec. 1080, p. 241, L. 1897; amd. Sec. 1, p. 160, L. 1901.

This section en. Sec. 1, Ch. 34, L. 1907; Sec. 6746, Rev. C. 1907; re-en. Sec. 9349, R. C. M. 1921; subsec. 5 repealed by Sec. 84, Ch. 13, L. 1961. Cal. C. Civ. Proc. Secs. 607, 608.

Repeal of Subsection 5

Subsection 5 of this section, relating to instructions to the jury, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-14.

Expert Testimony

In an action for wrongful death it was improper for plaintiff to call a retired engineer and seek his opinion on the required stopping distance through the use of a hypothetical question. *Gustafson v. Northern Pacific Ry. Co.*, — M —, 351 P 2d 212, 217.

Instructions on Res Ipsa Loquitur

If plaintiff desires the jury instructed on the doctrine of res ipsa loquitur, it was their duty to tender such instruction and request that it be given. *Whitney v. Northwest Greyhound Lines*, 125 M 528, 242 P 2d 257, 266, 268, 271 (dissenting opinion).

Rebuttal Evidence

Rebutting evidence is confined to that which tends to counteract new matter offered by the adverse party. *Gustafson v. Northern Pacific Ry. Co.*, — M —, 351 P 2d 212, 217.

93-5102. (9350) View by jury of the premises.

References

Cited or applied in *State v. Allison*, 122 M 120, 199 P 2d 279, 292.

93-5110. (9358) Verdict—how declared—form of—polling the jury.

Cross-Reference

See note to sec. 93-5111. *Fauver v. Wilkoske*, 123 M 228, 211 P 2d 420, 425, 17 ALR 2d 518.

93-5111. (9359) Repealed.

Repeal

This section (Sec. 172, p. 166, L. 1867;

Right to Open and Close

In eminent domain proceedings the party upon whom the burden of proof rests is entitled to open and close. *State v. Peterson*, 134 M 52, 328 P 2d 617, 629.

Specific Objections Required

Plaintiff, an iron worker, was employed by steel contractor in placing iron and steel around windows and walls during construction of building in connection with brick laying. In action against building contractor for injuries sustained when hoist maintained by defendants fell, after striking plank negligently placed across shaft by an employee of defendant, objection to instructions because they placed a higher duty on defendants than that fixed by law was not sufficiently specific to be subject to review. *Le Compte v. Wardell*, 134 M 490, 333 P 2d 1028, 1033.

Where the objections to instructions did not specifically point out the alleged error, the supreme court may not reverse the cause on that account. *Dimich v. Northern Pacific Ry. Co.*, — M —, 348 P 2d 786, 797.

Objections to instructions which were raised by defendant's brief on appeal could not be considered where they were not raised in the district court during the settlement of instructions. *Teesdale v. Anschutz Drilling Co.*, — M —, 357 P 2d 4, 12.

References

Cited or applied in *Richeson v. Toney*, — M —, 348 P 2d 803, 806.

Indoctrination by court of persons summoned for jury service as violating requirement of written instructions. 2 ALR 2d 1104.

Propriety of arguments and remarks by counsel implying that defendant carried liability insurance in personal injury or death action. 4 ALR 2d 786.

Validity and effect of verdict of "not guilty." 7 ALR 2d 1341.

Sec. 262, p. 104, L. 1877), relating to proceedings on an informal or insufficient

verdict, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-12.

Improper Verdict—Procedure

After a case has been submitted to the jury and a verdict returned, accepted and filed at the direction of the court and the jury discharged from the case, the only way to reach the verdict, if insufficient or against the law, is by a timely and proper motion for a new trial. *Fauver v. Wilkoske*, 123 M 228, 211 P 2d 420, 425, 17 ALR 2d 518.

Insufficient Verdict

Where the court in its original instruction told the jury it could find but one

verdict and the jury returned with a verdict for the plaintiff and also one for the defendant for a lesser amount, the court was correct in sending the jury back for further deliberation and requiring but one verdict. *Baranko v. Grenz*, 127 M 18, 256 P 2d 1074, 1076.

Judgment Notwithstanding the Verdict

It is not permissible in this state to move for a judgment non obstante verdicto in a law case. *Fauver v. Wilkoske*, 123 M 228, 211 P 2d 420, 425, 17 ALR 2d 518.

References

Cited or applied in *Brown v. Grenz*, 127 M 49, 257 P 2d 246, 248.

CHAPTER 52—THE VERDICT—GENERAL AND SPECIAL—DIRECTED WHEN

93-5201. (9360) Repealed.

Repeal

This section (Sec. 174, p. 167, L. 1867; Sec. 264, p. 105, L. 1877), relating to general and special verdicts, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-12.

Effect of Motions by Both Parties for Directed Verdict

When both parties move for a directed verdict, in the absence of a request that the jury be required to determine any question of fact, there is a waiver of the right to trial by jury and the court is constituted a trier of all questions of law and fact. The court can request the jury's

judgment upon any question in dispute but is not in error in submitting only a part of the questions of fact necessary to the determination of the case. In *re Glick's Estate*, — M —, 346 P 2d 987, 997.

Coercive effect of verdict urging by judge in civil case. 19 ALR 2d 457.

Validity of verdict in personal injury action which awards damages to plaintiff wife, but either finds against plaintiff husband seeking to recover medical expenses and the like, or awards nothing to him. 36 ALR 2d 1333.

Validity and efficacy of accused's waiver of unanimous verdict. 37 ALR 2d 1136.

93-5202. (9361) Repealed.

Repeal

This section (Sec. 175, p. 167, L. 1867; Sec. 265, p. 105, L. 1877), relating to general and special verdicts, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-12.

Interrogatories

A submission of interrogatories to the jury is within the sound discretion of the

district court and a refusal to submit such interrogatories cannot be predicated as error unless it is a clear abuse of discretion. *Teesdale v. Anschutz Drilling Co.*, — M —, 357 P 2d 4, 12.

Interrogatories are unnecessary where a general verdict is sufficient. *Teesdale v. Anschutz Drilling Co.*, — M —, 357 P 2d 4, 12.

93-5203. (9362) Verdict in actions for recovery of money, etc.

Disregard by court of verdict's apportionment among joint tortfeasors. 8 ALR 2d 862.

93-5205. (9364) Directed verdict—when.

Motion for Directed Verdict

Where both plaintiff and defendant move the court for a directed verdict, the trial judge becomes the trier of questions

both of law and of fact. *Granier v. Chagnon*, 122 M 327, 203 P 2d 982, 987.

Direction to the jury to bring in a verdict for plaintiff is permissible when a

case presents only a question of law. *Kraus v. Newman*, — M —, 352 P 2d 261, 262.

References

Cited or applied in *Richardson v. Crone*, 127 M 200, 258 P 2d 970, 972.

CHAPTER 53—TRIAL BY THE COURT

93-5301. (9365) Repealed.

Repeal

This section (Sec. 179, p. 168, L. 1867; Sec. 269, p. 106, L. 1877), relating to waiver of trial by jury, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2706-1(d) and 93-2706-2(b).

Operation and Effect

Where a minor, charged with being a delinquent, made a demand for a jury

trial on the day preceding the trial and at the opening of the trial, the demand was made in time and there was no waiver. *Application of Banschbach*, 133 M 312, 323 P 2d 1112, 1114.

References

Cited or applied in *Little v. Little*, 127 M 152, 259 P 2d 343, 344; *Seibel v. Byers*, — M —, 344 P 2d 129, 139.

93-5302. (9366) Upon trial by court, decision to be in writing, etc.

Failure to Make Findings—Remand

Where United States district court did not make findings of fact and state conclusions of law before entry of judgment, case was remanded with directions to make such findings of fact and state conclusions of law. *Dawson County v. Hagen*, 172 F 2d 387.

References

Cited in footnote 9 in 8 F. R. D. 275. Cited or applied in *Turnbull v. Brown*, 126 M 548, 254 P 2d 1085, 1086.

93-5303. (9367) Repealed.

Repeal

This section (Sec. 180, p. 168, L. 1867; Sec. 270, p. 106, L. 1877), relating to statement of facts found and conclusions of law, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-15(a).

Cross-Reference

See annotation to sec. 93-5302. *Dawson County v. Hagen*, 172 F 2d 387.

Operation and Effect

Even though findings based upon the allegations of the pleadings are valid, they must be weighed as to sufficiency by the

complaint or pleadings upon which they are based and if the findings of fact refer to the complaint, then to be sufficient, the complaint must state a cause of action. *Ballenger v. Tillman*, 133 M 369, 324 P 2d 1045, 1048.

Upon proper request it is the duty of the district court to make findings, in the absence of which the cause presents grounds for reversal. *Ballenger v. Tillman*, 133 M 369, 324 P 2d 1045, 1048.

References

Cited or applied in *Turnbull v. Brown*, 126 M 548, 254 P 2d 1085, 1086.

93-5305. (9369) Want of findings—judgment not reversed.

Modification of Custody Orders

In hearings on motions to modify child custody orders, parties desiring written findings of facts and conclusions of law must move for them in writing at the close of the evidence, as the statute requires. Even then, if the evidence justifies but one conclusion, formal findings are not necessary. *Trudgen v. Trudgen*, 134 M 174, 329 P 2d 225, 230.

In the absence of statute, the court need not make formal findings of fact in support of its order modifying the custody provisions of divorce decrees. *Trudgen v. Trudgen*, 134 M 174, 329 P 2d 225, 229.

Motion for New Trial

While this section does not include orders granting new trial, nevertheless it is applicable and the failure to make findings, when not requested, is not such an irregularity as to support an order for a new trial. *Kynett v. New Mine Sapphire Syndicate*, — M —, 350 P 2d 361, 366.

When Findings Not Necessary

Where case is submitted to court without a jury and the evidence justifies but one conclusion, formal findings are unnecessary though request be made for them in conformity with this section.

Perry v. Luding, 123 M 570, 217 P 2d 207, 217.

References

Cited or applied in Turnbull v. Brown,

126 M 548, 254 P 2d 1085, 1086; Sheridan County Electric Co-op. v. Anhalt, 127 M 71, 257 P 2d 889, 891; Bissell v. Bissell, 129 M 187, 284 P 2d 264, 269.

93-5306. (9370) Exception for defective findings, etc.

References

Cited or applied in Turnbull v. Brown,

126 M 548, 254 P 2d 1085, 1086; Polson v. Thomas, — M —, 357 P 2d 349.

93-5307. (9371) Exceptions to be filed and served on opposite party.

References

Cited or applied in Turnbull v. Brown, 126 M 548, 254 P 2d 1085, 1086; Sheridan

County Electric Co-op. v. Anhalt, 127 M 71, 257 P 2d 889, 891; Bissell v. Bissell, 129 M 187, 284 P 2d 264, 270.

93-5308. (9372) Trial upon agreed statement of facts.

References

Cited or applied in Shipman v. Todd, 131

M 365, 310 P 2d 300, 303 (dissenting opinion).

CHAPTER 54—REFERENCE AND TRIAL BY REFEREES

93-5401 to 93-5403. (9374 to 9376) Repealed.

Repeal

These sections (Secs. 182 to 184, p. 169, L. 1867; Secs. 273 to 275, p. 108, L. 1877), relating to reference to referees, were re-

pealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-16(a), (b), and (c).

93-5405 to 93-5407. (9378 to 9380) Repealed.

Repeal

These sections (Secs. 1134 to 1136, C. Civ. Proc. 1895), relating to proceedings before referees, were repealed by Sec. 84,

Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-16(a), (c), and (d).

93-5410 to 93-5412. (9383 to 9385) Repealed.

Repeal

These sections (Sec. 187, p. 170, L. 1867; Sec. 278, p. 109, L. 1877), relating to reports of referees and judicial proceed-

ings thereon, were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see Secs. 93-2706-15(a) and 93-2706-16(d) and (e).

CHAPTER 55—EXCEPTIONS—SETTLEMENT AND ALLOWANCE OF BILL

Section 93-5505. Exceptions not presented at time of ruling—notice to adverse party, how settled upon, etc.

93-5502. (9387) Repealed.

Repeal

This section (Sec. 280, p. 110, L. 1877; Sec. 1, Ch. 135, L. 1915; Sec. 1, Ch. 225, L. 1921), relating to assumed exceptions, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-9.

References

Cited or applied in State ex rel. Walker v. Board of Comrs., 120 M 413, 187 P 2d 1013, 1015.

93-5503. (9388) Exceptions and objections.

References

Cited in State v. Peterson, 134 M 52, 328 P 2d 617, 629.

93-5505. (9390) Exceptions not presented at time of ruling—notice to adverse party, how settled upon, etc. Whenever a motion for a new trial is pending, no bill of exceptions need be prepared or settled until the decision of the court upon motion for a new trial has been rendered, but a bill shall be prepared and settled in the same manner and within the same length of time after the decision on the motion for a new trial as is hereinafter provided for the making and settling of bills of exceptions.

Except as above provided, the party appealing from a final judgment, if he desires to present on appeal the proceedings had at the trial, must, within fifteen (15) days after the entry of judgment if the action was tried with a jury, or after receiving notice of the entry of judgment if the action was tried without a jury, or within such further time as the court or judge thereof may allow, not to exceed sixty (60) days, except upon affidavit showing the necessity for further time, prepare and file with the clerk of the court and serve upon the adverse party a bill of exceptions, containing all of the proceedings had at the trial upon which he relies, in which bill the evidence shall, unless otherwise prescribed by a rule of the supreme court, be stated in narrative form, except that the particular portion of the record showing objections to the admission or rejection of testimony upon which the party preparing the bill expects to rely, shall be set out verbatim.

Within ten (10) days after such service, the adverse party may propose amendments thereto, and serve the same, or a copy thereof, upon the other party.

The proposed bill and amendments must, within ten (10) days thereafter, be presented by the party seeking the settlement of the bill to the judge who tried or heard the case, upon five (5) days' notice to the adverse party, or be delivered to the clerk of the court or judge. When received by the clerk, he must immediately deliver them to the judge, if he be in the county; if he be absent from the county, and either party desire the papers to be forwarded to the judge, the clerk must, upon notice in writing of either party, immediately forward them by mail, or other safe channel; if not thus forwarded, the clerk must deliver them to the judge immediately after his return to the county.

When received, the judge must designate the time and place at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated, the judge must settle the bill.

If the action was tried before a referee, the proposed bill, with the amendments, if any, must be presented to such referee for settlement within ten (10) days after service of the amendments, upon notice of five (5) days to the adverse party, and thereupon the referee shall settle the bill. If no amendments are served, or if served are allowed, the proposed bill may be presented, with amendments, if any, to the judge or referee, for settlement without notice to the adverse party. It is the duty of the judge or referee, in settling the bill, to strike out of it all redundant and useless matter, so that the objections may be presented as briefly as possible.

When settled, the bill must be signed by the judge or referee with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.

In compensation cases the record certified by the industrial accident board to the district court shall be a part of the judgment roll, and not a part of the bill of exceptions, and the appellant taking an appeal to the supreme court of the state of Montana, shall by praecipe to the clerk of the district court designate such portions only of the judgment roll as the appellant deems necessary to be certified to the supreme court of the state of Montana. A copy of the praecipe shall be served upon the respondent, and filed with the clerk, and respondent may within ten (10) days after the date of service of the appellant's praecipe, excluding the day of service, likewise by praecipe served upon the appellant and filed with the clerk, designate such portions of the judgment roll which respondent desires to have incorporated in the record on appeal. Only such portions designated by the praecipes need be certified by the clerk as constituting the judgment roll.

History: En. Sec. 1155, C. Civ. Proc. 1895; re-en. Sec. 6788, Rev. C. 1907; amd. Sec. 3, Ch. 225, L. 1921; re-en. Sec. 9390, R. C. M. 1921; amd. Sec. 1, Ch. 85, L. 1955. Cal. C. Civ. Proc. Sec. 650.

Amendment

The 1955 amendment added the last paragraph.

Repealing Clause

Section 2 of Ch. 85, Laws 1955 repealed all acts and parts of acts in conflict therewith.

Death of Appellee's Attorney

There was no merit to an appellant's argument in opposition to a motion to strike a bill of exceptions that because an extension of time could not exceed 90 days without the consent of the adverse party, pursuant to section 93-8708, and because he could not get an extension until a new attorney for the adverse party was appointed, pursuant to section 93-2104, he was prevented from making a timely filing of his bill. Even though appellee's attorney may have died, section 93-2104 is not designed to enable a prospective appellant to disregard the time limitation on filing a bill, by delaying notice to the adverse party to appoint a new attorney. *Berg v. Fraser*, — M —, 349 P 2d 317, 319.

Discretion of Court

The court has a wide discretion under this section. *Barcus v. Portland Cattle Loan Co.*, 122 M 534, 207 P 2d 565, 566.

Effect of Failure to Have Settled Bill of Exceptions, on Appeal

Motion to strike purported bill of exceptions from the record and dismiss appeal was granted where transcript on appeal was not certified to be correct. *Fraser v. Johnson Flying Service, Inc.*, 132 M 607, 317 P 2d 316.

Effect of Failure to Present Bill within Time Limited by Statute

This section has specific application to the time that may be lawfully allowed for the preparation, service, filing and settlement of bills of exceptions. The provisions are mandatory; thus, where the statutory time of fifteen days has elapsed and there has not been an extension of time, the trial court is without power to settle or allow a bill of exceptions. *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 991 to 995.

Section 93-3905 pertaining to a court giving relief to a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect does not authorize relief from failure of a litigant to prepare, serve, and file his bill of exceptions within the time fixed by this section as extended by lawful orders of the court made pursuant to timely application by the litigant or his counsel. *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 991 to 995.

A bill of exceptions presented after the expiration of the time prescribed in the statute is a nullity. *Fraser v. Clark*, — M —, 352 P 2d 681, 683.

Effect of Failure to Present Bill within Time Limited by Statute or Extension of Time Granted by Court

Where a defendant served a proposed bill of exceptions after the time prescribed by statute and also after a 60 day extension granted by the court; the court was without jurisdiction to allow defendant's bill of exceptions and a motion to strike the bill of exceptions must be sustained. *Kemp v. Murphy*, 125 M 234, 233 P 2d 824.

Where a proposed bill of exceptions was not filed within the 60 day extension provided for in this section, or within any further extension for cause granted within

that time, the district court lost jurisdiction and had no power to settle the bill of exceptions. *Berg v. Fraser*, — M —, 349 P 2d 317, 319.

Extension of Time

Where court extends the time and defendant relies on such extension Supreme Court will not deprive the defendant of the benefit of that order after the time for filing and serving the bill of exceptions has expired. *Barcus v. Portland Cattle Loan Co.*, 122 M 534, 207 P 2d 565, 566.

If court erroneously made order extending the time to prepare, serve and file bill of exceptions under this section it had authority to correct such order under the provisions of section 93-8405. *Barcus v. Portland Cattle Loan Co.*, 122 M 534, 207 P 2d 565, 566.

Failure to Amend Bill of Exceptions by Adverse Party

Where an adverse party did not propose amendments to a bill of exceptions and did not suggest diminution of the record prior to submission of the cause to the reviewing court, the respondent could not be heard to say that the bill did not contain all the proceedings at the trial. *Deich v. Deich*, — M —, 323 P 2d 35, 47.

Jurisdiction on Appeal

Compliance with this statute is jurisdictional. *Fraser v. Clark*, — M —, 352 P 2d 681, 683.

Limitation

It is doubtful whether the legislature intended when it amended this section to still have section 93-8708 operate as a further limitation upon the courts in granting extension of time for a bill of exceptions. *State ex rel. Robbins v. Bonner*, 128 M 45, 270 P 2d 400, 402.

Motion to Strike Bill of Exceptions

Motion to strike bill of particulars was properly granted where record showed that it was not presented in time. *Fraser v. Clark*, — M —, 352 P 2d 681, 683.

Operation and Effect

This section and section 93-8708 are special statutes pertaining to the preparation and extension of time for the service and filing of bills of exceptions, and by the well-established rule of construction

in this state, control over general statutes. *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 995.

Appellant entitled to an extension of time within which to file a bill of exceptions where it was shown that the official court stenographer could not prepare a transcript setting forth the evidence and proceedings. *Petition of Butts*, 128 M 118, 271 P 2d 424.

Presumption When No Bill of Exceptions

Where record on appeal contains no bill of exceptions but only the judgment roll, the presumption must be indulged that the evidence introduced at the trial supports the trial court's finding and judgment. *Tiffany v. Uhde*, 123 M 507, 216 P 2d 375.

In the absence of a bill of exceptions the supreme court would not review alleged error concerning the comments of the county attorney but would presume that the trial court was correct in ruling in the manner it did. *State v. Ruona*, 133 M 243, 321 P 2d 615, 620.

Record

On appeal, where the lower court order granting the appellant an extension of time for the filing and serving of a bill of exception showed that it was made upon application and a showing made, the Supreme Court will not presume that the lower court acted in violation of the applicable statute in the absence of a showing to the contrary. *Erdmann v. Erdmann*, 127 M 252, 261 P 2d 367, 368, distinguished in 352 P 2d 683.

Where the judgment roll, motion for new trial, notice of intention to move for new trial, and order of court granting new trial were properly certified to the Supreme Court, but the transcript of testimony had no proper authentication, whether called a bill of exceptions or transcript of the minutes, there could be no determination whether the trial court's order granting a new trial was correct. *Nissen v. Western Construction Equipment Co.*, 133 M 143, 320 P 2d 997, 999.

References

Cited in *In re Hall's Estate*, 124 M 355, 224 P 2d 138, 140, 4 St Rep 148.

Raising defense of statute of frauds by motion to strike testimony after failure to object to parol evidence. 15 ALR 2d 1330.

93-5507. (9392) When exception is refused, etc.

References

Cited or applied in *State ex rel. Reid v. District Court*, 126 M 489, 255 P 2d 693,

698; *State v. Ruona*, 133 M 243, 321 P 2d 615, 620.

CHAPTER 56—NEW TRIALS—GROUNDS AND MOTIONS FOR—RECORD ON APPEAL FROM FINAL JUDGMENT

93-5603. (9397) When a new trial may be granted.

Subd. 1

Motion for Mistrial

Whenever it appears that there has been such misconduct in a trial or that prejudicial matter has been allowed to go to the jury, without opportunity to object in advance and the effect of which cannot be removed by an admonition on the part of the court, the aggrieved party may move for a mistrial and, failing in that, he will be deemed to have taken his chances with the jury. *Hayward v. Richardson Constr. Co.*, — M —, 347 P 2d 475. (*Robinson v. F. W. Woolworth Co.*, 80 M 431, 261 P 253, overruled.)

Subd. 2

Jurors Cannot Be Heard to Impeach Their Own Verdict

Jurors may not impeach their verdict by affidavit in support of a motion for a new trial except where it was reached by resort to chance. *Schaff v. Shaules*, — M —, 352 P 2d 265, 268.

Weight Given to Evidence by Jury

The construction or weight given to evidence by a jury is not a subject for inquiry upon a motion for a new trial. *Schaff v. Shaules*, — M —, 352 P 2d 265, 267.

Subd. 5

Excessive Damages

There is no measuring stick by which to determine the amount of damages to be awarded, other than the intelligence of a fair and impartial jury governed by a sense of justice, and each case depends on its own peculiar facts. *Thompson v. Yellowstone Livestock Comm.*, 133 M 403, 324 P 2d 412, 422.

Subd. 6

Insufficiency of Evidence

A rule that the Supreme Court will not interfere with the exercise of its discretion by the trial court is particularly applicable where questions of fact are involved and insufficiency of the evidence is urged as a ground for the motion for a new trial and it appears that the evidence is conflicting. *Seibel v. Byers*, — M —, 344 P 2d 129, 134.

Subd. 7

Error in Instructions

Where two instructions are given on the same point and there is an irreconcilable conflict between them, it is not material whether either instruction is correct as ap-

plied to the record and objection to the second instruction should have been sustained. *Bennett v. Dodgson*, 129 M 228, 284 P 2d 990, 993.

In General

Failure and Omission of Trial Judge to Allow or Grant Motion

Under the provisions of section 93-5606, where the trial judge failed and omitted to allow or grant plaintiff's motion for a new trial, the motion is deemed denied. *Seibel v. Byers*, — M —, 344 P 2d 129, 133.

Granting of New Trial as to Part of the Issues

Court has authority to grant a motion for new trial as to part of the issues and to deny it as to other issues. *State ex rel. Tripp v. District Court*, 130 M 574, 305 P 2d 1101, 1105.

Granting of New Trial as to Part of Verdict and Judgment

This section does not permit the piecemeal granting of the motion for a new trial. A motion for a new trial must be granted in whole or not at all and where the complaint set forth but a single count or single cause of action then the verdict which determines such controversy is a single entity which must stand or fall as a whole. *Seibel v. Byers*, — M —, 344 P 2d 129, 133.

Supervisory Control by Supreme Court

Where District Court acted under a misconception of law and granted a motion for a new trial on all of the issues, although it had the power to grant the new trial upon part of the issues only, the Supreme Court under its supervisory powers may grant complete relief and set aside the order for the new trial as to the issue which the District Court felt should not be granted. *State ex rel. Tripp v. District Court*, 130 M 574, 305 P 2d 1101. (Dissenting opinion on this point, 130 M 574, 305 P 2d 1101 at 1106.)

When Supreme Court Will Not Interfere on Refusal to Grant New Trial

The determination by a trial court of plaintiff's motion for a new trial involved the exercise of judicial discretion and may not lawfully be disturbed on review by the Supreme Court unless it is clearly shown that in pursuing the course it did, the trial court abused its discretion. *Seibel v. Byers*, — M —, 344 P 2d 129, 134.

References

Cited in *Perkins v. Kramer*, 121 M 595, 198 P 2d 475, 477; *State v. District Court*, 131 M 404, 310 P 2d 1055, 1057 (dissenting opinion); *Kynett v. New Mine Sapphire Syndicate*, — M —, 350 P 2d 361, 364; *Teesdale v. Anschutz Drilling Co.*, — M —, 357 P 2d 4, 13.

Voluntary statements damaging to accused, not proper subject of testimony, ordered by a testifying police or peace officer, as ground for granting new trial. 8 ALR 2d 1013.

Statements of witness in civil action secured after trial inconsistent with his testimony as basis for a new trial on ground of newly-discovered evidence. 10 ALR 2d 381.

Instructions in will contest defining natural objects of testator's bounty as ground for granting new trial. 11 ALR 2d 731.

Constitutional or statutory provision forbidding reexamination of facts tried by jury as affecting power to reduce or set aside verdict because of inadequacy. 11 ALR 2d 1217.

Standing of strangers to divorce proceeding to attack validity of divorce decree. 12 ALR 2d 717.

Deafness of juror as ground for new trial. 15 ALR 2d 534.

Death or disability of court reporter before transcription or completion of notes or record as ground for new trial or reversal. 19 ALR 2d 1095.

93-5604. (9398) New trials—on what papers made.

Time for Filing

Provisions relating to the time for filing a motion for a new trial and for the hear-

ing on a motion for new trial are mandatory. *Seibel v. Byers*, — M —, 344 P 2d 129, 133.

93-5605. (9399) Repealed.

Repeal

This section (Sec. 287, p. 112, L. 1877; Sec. 2, Ch. 92, L. 1905; Sec. 2, Ch. 41, L. 1907; Sec. 7, Ch. 225, L. 1921), relating to notice of intention to move for new trial, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2707-6(b) and (c).

Operation and Effect

Where notice of intention to move for a new trial was to be based on the minutes of court and affidavits to be filed and no affidavits were filed and no additional time for filing was obtained from the court, the moving parties had only ten additional days after the ten day period for filing affidavits in which to have the motion heard. *State v. District Court*, 131 M 404, 310 P 2d 1055, 1056.

93-5606. (9400) Hearing of motion—continuance—papers used.

Extensions of Time

An order extending the time for affidavits or counter affidavits in order to be effective must be made before the lapse of time theretofore granted. *State ex rel. Tripp v. District Court*, 130 M 574, 305 P 2d 1101, 1103.

Time for Filing

Provisions relating to the time for filing a motion for a new trial and for the hearing on a motion for new trial are mandatory. *Seibel v. Byers*, — M —, 344 P 2d 129, 133.

Who Is Adverse Party

Resident heirs summoned in a will contest but who did not appear are not adverse parties upon whom notice of motion for new trial must be served, even though no default was entered against them. In *re Hardy's Estate*, 133 M 536, 326 P 2d 692.

With respect to the definition of adverse parties upon whom notice must be served, this section and section 93-8005, relating to appeals, are on the same footing. In *re Hardy's Estate*, 133 M 536, 326 P 2d 692.

References

Cited or applied in *State ex rel. Gilreath v. District Court*, 127 M 431, 265 P 2d 651, 653 (dissenting opinion); *Pattyn v. Favars*, 133 M 560, 327 P 2d 818, 821.

Time for Hearing Motion

The ten day period in this section commences to run at the expiration of the time allowed for the filing of affidavits and counter affidavits and not at the actual time of the filing. *State ex rel. Tripp v. District Court*, 130 M 574, 305 P 2d 1101, 1103.

Time Motion for New Trial Submitted

Where trial judge after hearing arguments on a motion for a new trial and then made an order that the matter was not considered submitted until the parties

filed briefs and allowed 30 days for the filing of briefs and then the final briefs were filed within 26 days, the motion for a new trial was considered submitted when the last brief was filed rather than at the end of the 30-day period allowed for filing the briefs since at that time the court had everything before it necessary to decide the motion for a new trial. *State ex rel. Gilreath v. District Court*, 127 M 431, 265 P 2d 651. (See, however, dissenting opinion, 127 M 431, 265 P 2d 651, 652.)

When Motion Deemed Denied and Jurisdiction Lost

Where more than 15 days elapsed before

93-5608. (9402) Contents of record on appeal.

Copy of Notice of Appeal

Where no copy of any notice of appeal appears in either the transcript on appeal or in the files of the Supreme Court or having been supplied in the court, the purported appeal will be dismissed for want of jurisdiction. *Hansen v. Hansen*, 129 M 516, 290 P 2d 438.

Record on Appeal in General

Where defendant appealed from an order granting plaintiff a new trial on the grounds of newly-discovered evidence, insufficiency of evidence, and error in law occurring at the trial, and defendant had judgment roll, transcript of testimony, settlement instructions, motion for new

any further action was taken on a motion for a new trial, the motion was by force of this section deemed denied and the court had no jurisdiction thereafter to grant the motion. *State ex rel. Green v. District Court*, 126 M 176, 246 P 2d 813.

References

Cited or applied in *Bissell v. Bissell*, 129 M 187, 284 P 2d 264, 270; *State v. District Court*, 131 M 404, 310 P 2d 1055, 1056.

Necessity that trial court give parties notice and opportunity to be heard before ordering new trial on its own motion. 23 ALR 2d 852.

trial, notice of intention to move for a new trial, and the order granting a new trial certified by the clerk, but did not have the transcript of minutes certified by the District Court, or a bill of exceptions properly prepared, the appeal was dismissed because the Supreme Court could not determine whether the order was correct. *Nissen v. Western Construction Equipment Co.*, 133 M 143, 320 P 2d 997.

References

Cited or applied in *State ex rel. Walker v. Board of Comrs.*, 120 M 413, 187 P 2d 1013, 1015; *First National Bank of Missoula v. Mercer*, 128 M 535, 279 P 2d 695, 696.

CHAPTER 57—JUDGMENT—MANNER OF GIVING AND ENTRY—JUDGMENT ROLL AND DOCKET—LIEN OF

93-5701. (9403) Repealed.

Repeal

This section (Sec. 197, p. 174, L. 1867; Sec. 290, p. 115, L. 1877), relating to time of entry of judgments, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2707-5.

Amendment of Verdict

Where, in an action to recover a money judgment for personal injuries sustained in an automobile accident, the evidence was conflicting and the plaintiff's damages unliquidated and the jury's verdict assessed the plaintiff's damages and judgment was entered in conformity to the verdict, neither the trial court nor the Supreme Court possessed the power to delete from the jury's verdict the words and figures denoting the assessed damages. *Seibel v. Byers*, — M —, 344 P 2d 129, 139.

Improper Verdict—Procedure

After a case has been submitted to the

jury and a verdict returned, accepted and filed at the direction of the court and the jury discharged from the case, the only way to reach the verdict, if insufficient or against the law, is by a timely and proper motion for a new trial. *Fauver v. Wilkoske*, 123 M 228, 211 P 2d 420, 425, 17 ALR 2d 518.

Judgment Notwithstanding the Verdict

It is not permissible in this state to move for a judgment non obstante veredicto in a law case. *Fauver v. Wilkoske*, 123 M 228, 211 P 2d 420, 425, 17 ALR 2d 518.

Operation and Effect

In an action in tort for damages, even though plaintiff's undisputed evidence showed damage to his property in the sum of \$707.45, where plaintiff made no cross-appeal nor asked for any relief other than that the judgment be affirmed, a judgment in plaintiff's favor in the amount of

\$296.88 would be affirmed. *Hoenstine v. Rose*, 131 M 557, 312 P 2d 514, 518.

References

Cited or applied in *Seibel v. Byers*, — M —, 344 P 2d 129, 132.

Power of successor judge taking office during term time to vacate, etc., judgment entered by his predecessor. 11 ALR 2d 1117.

93-5703. (9405) Repealed.

Repeal

This section (Sec. 199, p. 174, L. 1867; Sec. 291, p. 115, L. 1877), relating to judgment on counterclaim, was repealed by Sec.

84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-7(c).

93-5707. (9409) Judgment roll—contents and filing.

Order Dismissing an Action is Part of the Judgment Roll

Final order overruling motion to quash certiorari was an order deemed excepted to by section 93-5502 and properly incorporated in the judgment roll. *State ex rel. Walker v. Board of Comrs.*, 120 M 413, 187 P 2d 1013, 1016, distinguished in 158 F Supp 246.

introduced at the trial supports the trial court's finding and judgment in all cases where the record contains no bill of exceptions but only the judgment roll. *Warren v. Warren*, 127 M 259, 261 P 2d 364, 366.

Review of Judgment Roll on Appeal

The presumption is that the evidence

Vendee's interest under executory contract as subject to judgment lien. 1 ALR 2d 740.

93-5708. (9410) Judgment lien—when it begins and when it expires.

Operation and Effect

The lien created by this section is not applicable in the case of a bequest of per-

sonal property to a legatee. *Hustad v. Reed*, 133 M 211, 321 P 2d 1083, 1088.

93-5710. Recorded judgment or decree as notice, despite defects, etc.

Operation and Effect

The lien created by this section is not applicable in the case of a bequest of personal property to a legatee. *Hustad v. Reed*, 133 M 211, 321 P 2d 1083, 1088.

respects self-dealing in assets of estate. 1 ALR 2d 1060.

Judgment as res judicata pending appeal or motion for a new trial, or during the time allowed therefor. 9 ALR 2d 984.

Conclusiveness of allowance of account of trustee or personal representative as

Status of judgment or order as res judicata as affected by subsequent dismissal, discontinuance or nonsuit. 11 ALR 2d 1420.

93-5713. (9414) Satisfaction of a judgment—how made.

Compelling Acknowledgment of Satisfaction

Until a judgment is in fact satisfied the court has no authority to compel an acknowledgment of satisfaction or indorsement on the face of the judgment or on the margin of the record of judgment. *Galbreath v. Armstrong*, 121 M 387, 193 P 2d 630, 632.

"Satisfaction in Fact" Defined

"Satisfaction in fact" means payment of the judgment without the entry of record of such payment and a tender of satisfaction is not the same as satisfaction.

Galbreath v. Armstrong, 121 M 387, 193 P 2d 630, 632.

Tender of Satisfaction Refused—Extinguishing Judgment

Where tender of satisfaction of judgment is refused there can be no "satisfaction in fact" of the judgment by the payment of the money into court, but the debt must be extinguished under the provisions of section 58-423. *Galbreath v. Armstrong*, 121 M 387, 193 P 2d 630, 632.

Remedy and procedure to avoid release or satisfaction of judgment. 9 ALR 2d 553.

CHAPTER 58—THE EXECUTION

93-5802. (9417) Execution—requirements of writ.**References**

Cited or applied in *Stokke v. Graham*, 129 M 96, 281 P 2d 1025, 1027.

93-5812. (9426) Claims by third persons.**References**

Cited in *Letz v. Letz*, 123 M 494, 215 P 2d 534.

Surplus income of trust, in excess of amount required for support and education of beneficiary, as subject of supplementary proceedings. 36 ALR 2d 1227.

Rights of creditors of life insured as to options or other benefits available to him during his lifetime. 37 ALR 2d 268.

Execution in action on note or bond, not resulting in sale of mortgaged property, as precluding foreclosure of real estate mortgage. 37 ALR 2d 962.

93-5813. (9427) Property exempt from execution.**Motions to Exempt**

It is customary in the practice in this state to use affidavits with motions to exempt; however, it is not required by statute. A showing of jurisdiction and exempt status can be made by deposition or at a hearing on a motion or by petition to exempt. *Kidder v. Varner*, — M —, 347 P 2d 721.

Where a ruling denying defendant's motion to release attached property was based on what the court considered to be an informality of the accompanying affidavit, the ruling lacked finality and was not a bar to a new motion and affidavit. *Kidder v. Varner*, — M —, 347 P 2d 721.

93-5814. (9428) Specific exemptions.**Motions to Exempt**

It is customary in the practice in this state to use affidavits with motions to exempt; however, it is not required by statute. A showing of jurisdiction and exempt status can be made by deposition or at a hearing on a motion or by petition to exempt. *Kidder v. Varner*, — M —, 347 P 2d 721.

Where a ruling denying defendant's motion to release attached property was based on what the court considered to be an informality of the accompanying affidavit, the ruling lacked finality and was not a bar to a new motion and affidavit. *Kidder v. Varner*, — M —, 347 P 2d 721.

93-5826. (9434) Sales—how conducted.

What constitutes a "public sale." 4 ALR 2d 575.

Enforceability as between the parties of agreement to purchase property at judicial

sale for their joint benefit. 14 ALR 2d 1267.

CHAPTER 59—PROCEEDINGS SUPPLEMENTARY TO EXECUTION

93-5901. (9454) Debtor required to answer concerning his property.**Cross-Reference**

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

References

Hustad v. Reed, 133 M 211, 321 P 2d 1083.

93-5906. (9459) Judge may order property to be applied on execution.**Operation and Effect**

If there is a denial of ownership of property which is sought in proceedings supplementary, the court is not to determine whether the claim is valid or invalid, but may only apply the provisions of section 93-5907 and order that an action be instituted to determine the fact in dispute.

Hustad v. Reed, 133 M 211, 321 P 2d 1083, 1087.

This statute may be the basis of an order of application only when the supplementary proceedings result in the discovery of property or assets in the hands of a third person which indisputably belong to the debtor, and if the ownership of the

property is in dispute the court is powerless to make an order directing its delivery

to the creditor. *Hustad v. Reed*, 133 M 211, 321 P 2d 1083, 1087.

93-5907. (1946) Proceedings upon claim of another party to property, etc.

Contested Claims to Property

Contested claims as to title to property which the judgment creditor seeks to subject to his execution can not be litigated in proceedings supplementary to execution. *Letz v. Letz*, 123 M 494, 215 P 2d 534.

Operation and Effect

If there is a denial of ownership of property sought in proceedings supplementary, the court is not to determine whether the claim is valid or invalid, but may only proceed under the provisions of this section. *Hustad v. Reed*, 133 M 211, 321 P 2d 1083, 1087.

CHAPTER 60—FORECLOSURE OF MORTGAGES—ACTIONS FOR—SALES UNDER POWERS

93-6001. (1946) Proceedings in foreclosure suits.

Scope of Section

Where defendants did not plead a note and mortgage in bar to an action for money had and received, but introduced them as exhibits as evidence of their theory of gift, which was rejected by the

jury, as the case was pleaded and the issue joined there was no debt secured by mortgage which would make applicable the provisions of this section. *Puterbaugh v. Ash*, 135 M 463, 342 P 2d 742.

CHAPTER 61—NUISANCE, WASTE AND TRESPASS ON REAL PROPERTY—ACTIONS FOR

93-6101. (1947) Nuisance defined and actions for.

References

Cited or applied in *State ex rel. Harrison v. Deniff*, 126 M 109, 245 P 2d 140.

Attracting people in such numbers as to obstruct access to neighboring premises, as nuisance. 2 ALR 2d 437.

Casting of light on another's premises as constituting nuisance. 5 ALR 2d 705.

Coalyard as nuisance. 8 ALR 2d 419.

Liability of landowner on theory of nuisance for drowning of child. 8 ALR 2d 1280, 1309.

Liability of owner or occupant of abutting property for damage caused by fall of tree into highway. 11 ALR 2d 626.

Action for damages by tenant against stranger for nuisance to help and comfort. 12 ALR 2d 1228.

CHAPTER 62—QUIETING TITLE TO PROPERTY, REAL AND PERSONAL AND OTHER ACTIONS CONCERNING REAL ESTATE

Section 93-6206. Service of summons by publication, when.

93-6207. Order for publication of summons—how obtained—affidavit.

93-6201. (1947.1) Quieting title to personal property, action for.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

District Court Could Not Quiet Title in Special Probate Proceeding

In a special probate proceeding under section 91-4321, a statute for the termination of a life estate, the court could not render judgment quieting title to the property in question. In *re Vincent's Estate*, 133 M 424, 324 P 2d 403, 408.

Jury Trial

Actions to quiet title and petitions for writs of possession to enforce a court's decree are of equitable cognizance and the findings of a jury in such an action are only advisory. *Fuller v. Gibbs*, 122 M 177, 199 P 2d 851, 854.

Operation and Effect

In an action to quiet title and establish the boundary between two tracts of land, where the owners of the tracts re-

ceived their deeds according to governmental surveys and a fence was in existence but the fence was never described as a boundary, the parties are bound by the true line as ascertained by the survey. *Reel v. Walter*, 131 M 382, 309 P 2d 1027, distinguished in 325 P 2d 916.

93-6202. (9478.2) Provisions applicable.

References

Cited or applied in *Clinton v. Miller*,

References

Cited or applied in *Henningsen v. Stromberg*, 124 M 185, 221 P 2d 438.

124 M 463, 226 P 2d 487; *Bentley v. Rosebud County*, 230 F 2d 1.

93-6203. (9479) Actions to quiet title to real property—parties—venue.

Scope of Proceeding

As this section permits inquiry into the whole title of property in question, it was proper for plaintiff in his reply to an answer alleging an oil and gas interest, to seek the cancellation of the oil and gas leases. *Schumacher v. Cole*, 131 M 166, 309 P 2d 311, 313.

Stockholder of Corporation

A single stockholder cannot bring suit to quiet title to land to which he claims

the corporation is the sole and exclusive owner. *Noble v. Farmers' Union Trading Co.*, 123 M 518, 216 P 2d 925, distinguished in 284 P 2d 260.

References

Cited or applied in *Ryan v. Bloom*, 120 M 443, 186 P 2d 879, 881; *Warren v. Warren*, 127 M 259, 261 P 2d 364, 366; *Fraser v. Clark*, 128 M 160, 273 P 2d 105, 115; *Malcom v. Stondall Land & Investment Co.*, 129 M 142, 284 P 2d 258, 261.

93-6204. (9480) Parties defendant—unknown claimants.

Caption of Complaint

It is not necessary that the quoted words at the end of this section be used in exactly that form but any other apt words might be used. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 492.

The commas in the quoted phrase at the end of this section are not necessary, material or of any moment. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 492.

The caption of a complaint using the quoted words at the end of this section is not defective because of the omission of the comma which appears after the

word "estate." *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 492.

Construction

As enacted in 1915 there was no comma after the word "estate" in the quoted words at the end of this section, and the added comma is unnecessary. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 492.

References

Cited or applied in *Bentley v. Rosebud County*, 230 F 2d 1.

93-6205. (9481) Notice of pendency of action.

Construction

The order for publication of summons referred to in this section is that provided for in section 93-6207. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 495.

Operation and Effect

This section specifies no particular or exclusive kind of proof to establish the fact that lis pendens was filed in the county clerk's office. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 495.

93-6206. (9482) Service of summons by publication, when. Upon the return of summons showing the failure to find any defendant specifically named in the complaint, the plaintiff may obtain an order for the service of summons upon such defendant, to be made by publication, upon filing with the clerk of said court an affidavit stating that such defendant resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, or that the defendant, if a foreign corporation, has no agent for the service of process, nor managing or business agent, cashier, secretary, or other officer within the state; or that the defendant, if a domestic corpor-

ation, has no officer or agent of such corporation, upon whom valid service of said corporation can be made and who can, after due diligence, be found within the state. Such affidavit shall be sufficient evidence of the diligence of any inquiry made by the affiant, if the affidavit recite the fact that diligent inquiry was made, and it need not detail the facts constituting such inquiry.

History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9482, R. C. M. 1921; amd. Sec. 1, Ch. 66, L. 1949; amd. Sec. 1, Ch. 229, L. 1953.

Amendments

The 1949 amendment substituted the words "that after due diligence and search" following "affidavit setting forth" for "the facts" and added the last sentence.

The 1953 amendment completely rewrote this section. Prior to amendment it read "When any defendant specifically named in such complaint resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, or when any defendant is a foreign corporation, having no agent for the service of process, nor managing or business agent, cashier, secretary, or other officer within the state, or when any defendant is a domestic corporation and none of the officers or agents of such corporation, upon whom valid service of said corporation can be made, can, after due diligence, be found within the state, the plaintiff, upon the return of the summons showing due personal service within the state upon all defendants specifically named in the complaint, other than such as come within the meaning of the foregoing provisions of this section, and upon filing with the clerk of said court an affidavit setting forth that after due diligence and search with reference to any of such defendants upon whom personal service of

summons within the state cannot be made, within the meaning of the foregoing provisions of this section, may obtain an order for the service of summons upon such defendants last mentioned, to be made by publication. The affidavit shall be sufficient for all purposes if the same is worded in the terms of this statute."

Repealing Clauses

Section 2 of Ch. 66, Laws 1949 and Sec. 2 of Ch. 229, Laws 1953 repealed all acts and parts of acts in conflict therewith.

Effective Dates

Section 3 of Ch. 66, Laws 1949 provided the act should be in effect from and after the date of its passage and approval. Approved February 25, 1949.

Section 3 of Ch. 229, Laws 1953 provided the act should be in effect from and after its passage and approval. Approved March 6, 1953.

Cross-Reference

See note to sec. 93-6207. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 494.

Quiet Title Actions

Where the affidavit filed in support of the motion for an order allowing service by publication failed to fulfill the statutory requirements of setting forth the evidentiary facts supporting the conclusion that the defendant resides out of the state, a judgment as to such person is without force and effect. *Bentley v. Rosebud County*, 230 F 2d 1.

93-6207. (9483) Order for publication of summons—how obtained—affidavit. The plaintiff or his attorney may obtain an order for the service of summons upon all unknown claimants or possible claimants by publication, upon filing with the clerk of court an affidavit stating that he has made diligent search and inquiry for all persons who claim, or might claim, any right, title, estate, or interest in, or lien, or encumbrance upon, such real property, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any right of dower, inchoate or accrued, and has specifically named as defendants in such action all such persons whose names can be ascertained; a statement in such affidavit that said affiant has so made diligent search and inquiry shall be sufficient if made in the words of this statute and it need not detail, in any respect the acts constituting such diligent search and inquiry. One affidavit and order for service

by publication may be made to include all defendants, known and unknown, upon whom such service is sought, and in such event but one (1) summons shall be published, and the same shall be directed to all defendants upon whom such summons shall be served by publication; but no order for service by publication shall be made until proof of the filing of the notice of the pendency of such action, in accordance with the provisions of section 93-6205, has been made to the court. That the order above provided for may be issued by either the judge or the clerk of the court, and any order for the service of summons by publication in quiet title actions which may have been heretofore issued or made by the clerk of the court is hereby declared to be valid and of the same force and effect as if the same had been issued or made by the judge of the court.

History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9483, R. C. M. 1921; amd. Sec. 2, Ch. 70, L. 1931; amd. Sec. 1, Ch. 103, L. 1953.

Amendment

The 1953 amendment inserted the words "or his attorney"; substituted the word "stating" for "showing" in the first sentence and added the words "a statement in such affidavit that said affiant has so made diligent search and inquiry shall be sufficient if made in the words of this statute and it need not detail, in any respect the acts constituting such diligent search and inquiry."

Repealing Clause

Section 2 of Ch. 103, Laws 1953 repealed all acts and parts of acts in conflict therewith.

Effective Date

Section 3 of Ch. 103, Laws 1953 provided the act should be in effect from and after its passage and approval. Approved February 28, 1953.

Affidavit Filed by Attorney

There is no statutory prohibition against the attorney for the plaintiff filing the affidavit required by this section. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 494.

Filing of Original Summons with Return Not Required

There is no provision which requires that the original summons with the return thereon must first be filed with the clerk of the court before an order of publication may be obtained. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 495.

93-6210. (9487) Jurisdiction acquired by service—effect of decree, etc.

References

Cited or applied in *Bentley v. Rosebud County*, 230 F 2d 1.

93-6211. (9488) Who bound by judgment.

References

Cited or applied in *Bentley v. Rosebud County*, 230 F 2d 1.

93-6215. (9491) When value of improvements may be allowed as set-off.

Deed Not Describing Land

A tax deed and quitclaim deed which did not describe the land did not constitute "color of title" which would enable defendant to set-off the value of improvements against the damages. *Pritchard Petroleum Co. v. Farmers Co-op. Oil & Supply Co.*, 121 M 1, 190 P 2d 55, 61.

Operation and Effect

This statute does not prescribe the exclusive method by which an occupying claimant may recoup the value of improvements but a set-off may be obtained under the rules of the common law. *Pritchard Petroleum Co. v. Farmers Co-op. Oil & Supply Co.*, 121 M 1, 190 P 2d 55, 62.

93-6225. (9501) Action to establish title to property, etc.

References

Cited or applied in *Laas v. All Persons*, 121 M 43, 189 P 2d 670, 671.

93-6239. (9515) Remedies cumulative.**References**

Cited or applied in *In re Vincent's Estate*, 133 M 424, 324 P 2d 403, 408.

CHAPTER 63—PARTITION OF REAL ESTATE—ACTIONS FOR

Section 93-6301.1. Personal property—partition or sale—jurisdiction.

93-6301.2. Procedure for partition of personal property.

93-6301. (9516) Who may bring actions for partition.**Cross-Reference**

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

93-6301.1 Personal property—partition or sale—jurisdiction. When any personal property is owned by two or more persons, any one or more thereof may bring an action, according to the respective rights of the persons interested therein, for the partition of such property, or for a sale of the same, or any part thereof, if it appears that a partition cannot be made without great prejudice to the owners. Such action shall be brought in the county wherein said property, or any part thereof, is situated.

History: En. Sec. 1, Ch. 143, L. 1959.

Title of Act

An act relating to actions for the partition or sale of personal property; pro-

viding where such actions may be brought; and providing for the procedure which shall be made applicable thereto; and providing for an effective date.

93-6301.2. Procedure for partition of personal property. The provisions contained in chapter 63 of the Revised Codes of Montana, 1947, which prescribe the manner in which real property may be sold is hereby made applicable to the action which is authorized by section 1 [93-6301.1], hereof.

History: En. Sec. 2, Ch. 143, L. 1959.

Effective Date

Section 3 of Ch. 143, Laws 1959 provided

the act should be in effect from and after its passage and approval. Approved March 5, 1959.

93-6307. (9522) Lis pendens to be filed.**References**

Cited or applied in *Emery v. Emery*, 122 M 201, 200 P 2d 251, 265.

93-6319. (9534) Partition according to rights of parties.**References**

Cited and applied in *Ivins v. Hardy*, 134 M 445, 333 P 2d 471, 477.

93-6321. (9536) Referees must make report.**References**

Cited and applied in *Ivins v. Hardy*, 134 M 445, 333 P 2d 471, 477.

93-6322. (9537) Judgment upon confirmation of report—upon whom, etc.**Ranching Property**

In proceedings to partition large ranching property confirming order of the district court must stand in the absence of any substantial showing of gross inequal-

ity or the use of wrong principles in the referees' report. On appeal, the report of the referees may not be re-refereed for lesser reasons. *Ivins v. Hardy*, 134 M 445, 333 P 2d 471, 477, 480.

93-6329. (9544) Proceeds of sale, disposition of.

Rights of surviving spouse and children in proceeds of partition sale of homestead in decedent's estate. 6 ALR 2d 515.

93-6331. (9546) Sales must be at public auction.**Judicial Sales**

This section does not forbid sales by the court on confirmation. Continental Oil Co.

v. McNair Realty Co., — M —, 353 P 2d 100, 106.

CHAPTER 64—QUO WARRANTO

93-6401. (9576) When proceedings may be instituted.**References**

Cited or applied in State ex rel. Reid v. District Court, 126 M 489, 255 P 2d 693, 704.

Applicability of statute of limitations on laches to quo warranto proceedings. 26 ALR 2d 828.

CHAPTER 67—JUSTICES' COURTS—MANNER OF COMMENCING ACTIONS IN

93-6707. (9632) Time for appearance of defendant.**References**

Cited in State ex rel. Sullivan v. District Court, 122 M 1, 196 P 2d 452, 453.

CHAPTER 80—SUPREME COURT—APPEALS TO

93-8001. (9729) How judgments and orders may be reviewed.**Appeals from Justice Courts**

The Supreme Court does not have appellate jurisdiction to review the judgments or orders of the justice courts of this state. State ex rel. Estes v. Justice Court of Jefferson County, 129 M 136, 284 P 2d 249, 250.

Application

This statute is both prohibitory and jurisdictional. McVay v. McVay, 128 M 31, 270 P 2d 393, 395.

Operation and Effect

The right of appeal is purely statutory. The legislature has laid down the rules governing appeals. Sheridan County Electric Co-op. v. Anhalt, 127 M 71, 257 P 2d 889, 890.

References

Cited or applied in Fey v. A A Oil Corp., 126 M 552, 255 P 2d 339, 341.

93-8002. (9730) Party aggrieved may appeal—names of parties.**References**

Cited or applied in Sheridan County Electric Co-op. v. Anhalt, 127 M 71, 257 P 2d 889, 893.

Appeal by applicant for intervention from final judgment in the cause. 15 ALR 2d 368.

Right of express trustee to appeal from order or decree not affecting own personal interest. 6 ALR 2d 147.

Parties entitled to appeal from an order on application for removal of personal representative, guardian or trustee. 37 ALR 2d 751.

93-8003. (9731) From what judgment or order an appeal may be taken.**Subd. 1—Final Judgments****Appeal from Part of Judgment**

In an action to recover a money judgment for personal injuries sustained in an automobile accident where the evidence was conflicting and the damages unliquidated, neither the trial court nor Supreme Court is authorized to enter an absolute

judgment for any other sum than that assessed by the jury unless the parties litigant file their consent thereto and the plaintiff cannot fix and limit the scope of the Supreme Court's review by appealing only from that part of the verdict and judgment assessing damages. Seibel v. Byers, — M —, 344 P 2d 129, 138.

Award of Temporary Alimony and Attorneys' Fees

An award of temporary alimony and attorneys' fees to a wife is a final judgment within the meaning of subdivision 1 of this section. *Walker v. Walker*, 129 M 295, 285 P 2d 590, 592.

Dismissal of Action

An order dismissing an action is a final judgment from which an appeal can be perfected if the order has the effect of finally determining the rights of the parties. *Kelly v. Harris*, 158 F Supp 243, 247.

Findings of Fact and Conclusions of

Law

Findings of fact and conclusions of law are not a judgment nor are they an order, as known to our practice; they are the court's statement on which he will base his order or judgment. *Sheridan County Electric Co-op. v. Anhalt*, 127 M 71, 257 P 2d 889, 891.

Subd. 2—Orders

A. What Orders May be Appealed From

Denial of Motion to Release Attachment

Fact that motion was to vacate or release attachment rather than to dissolve the attachment would not prevent the order denying the motion from being appealable. *Stallinger v. Goss*, 121 M 437, 193 P 2d 810.

Denying Writ of Habeas Corpus

An order denying a writ of habeas corpus is appealable. *State ex rel. Veach v. Veach*, 122 M 47, 195 P 2d 697, 700.

Modification of Child Custody Decree

An appeal from an order modifying a decree as to custody of children can only be stayed by an application for a stay made and granted under subd. 2 of this section. *Application of Nelson*, 132 M 252, 316 P 2d 1058, 1059.

Order Denying an Injunction

Where temporary injunction to abate nuisance under section 94-1002 was quashed the same day issued upon presentation of affidavit of defendant under section 93-4211 and in its stead was issued an order to show cause why an injunction should not issue and enjoining defendant from operating "any of the games of chance described in the complaint contrary to the laws of the State of Montana" such order was appealable. *State ex rel. Olsen v. 30 Club*, 124 M 91, 219 P 2d 307, 309.

Order Granting an Injunction

A judgment and order granting an injunction in an interpleader action was appealable. *Central Montana Stockyards v. Fraser*, 133 M 168, 320 P 2d 981, 987.

A judgment in an interpleader action dismissing plaintiff from the action and awarding it costs, enjoining defendants from prosecuting any action against the plaintiff involving a fund deposited, and ordering defendants to interplead in the action instituted by the plaintiff, was appealable. *Central Montana Stockyards v. Fraser*, 133 M 168, 320 P 2d 981, 987.

Ordering Satisfaction of Judgment

An order, after final judgment, ordering plaintiff to satisfy judgment upon tender of specified amount by defendant was an appealable order. *Galbreath v. Armstrong*, 121 M 387, 193 P 2d 630, 632.

Order Made after Final Judgment Denying Realtors' Motion to Strike from the Memorandum of Costs

Since an appeal may be taken from a special order made after judgment which modifies a judgment theretofore entered and adversely affects the rights of a party to the litigation, an application for a writ of supervisory control will be denied. *State ex rel. Ferris v. District Court*, 126 M 623, 255 P 2d 687.

B. What Orders May Not be Appealed From

Order for an Accounting

An order for an accounting is not an appealable order under this section. *Corcoran v. Fousek*, 125 M 223, 233 P 2d 1040, 1041.

Order Refusing to Dissolve Restraining Order

A temporary restraining order is not an injunction within the meaning of this section, and an order refusing to dissolve such temporary restraining order is not appealable. *Guardian Life Ins. Co. v. State Bd. of Equalization*, 134 M 526, 335 P 2d 310.

In General

Effect of Failure to Appeal

Where a decree of distribution was entered on an estate and no appeal was taken from such decree, an affidavit thereafter filed and recorded, stating that the affiant was an heir and devisee of the will and claiming an interest in the real estate distributed, was void on its face and constituted no cloud on the title to the land. *Hart v. Barron*, 122 M 350, 204 P 2d 797, 805.

References

Cited or applied in *State ex rel. Walker v. Board of Comrs.*, 120 M 413, 187 P 2d 1013, 1015; *State ex rel. Sanford v. District Court*, 124 M 429, 225 P 2d 866, 868; *Malick v. Peterson*, 124 M 585, 228 P 2d 963; *Little v. Little*, 125 M 278, 234 P 2d 832, 834; *State ex rel. Reid v. District Court*, 126 M 489, 255 P 2d 693, 695; *In re Hansen's Estate*, 128 M 270, 273 P 2d 103, 104; *State ex rel. Adamson v. District Court*, 128 M 538, 279 P 2d 691, 695; *Fraser v. Clark*, 129 M 56, 282 P 2d 459, 460; *In re Hansen's Estate*, 129 M 261, 284 P 2d 1007, 1009; *State v. Zumwalt*, 129 M 529, 291 P 2d 257, 259; *Marchi v. Brack-*

man, 130 M 228, 299 P 2d 761, 764; *State ex rel. Tripp v. District Court*, 130 M 574, 305 P 2d 1101, 1105.

Appealability of order entered on motion to strike pleading. 1 ALR 2d 422.

Provision for future accounting as affecting finality of judgment or decree for purpose of review. 3 ALR 2d 342.

Appealability of order overruling motion for judgment on pleadings. 14 ALR 2d 460.

Right to appellate review, on single appellate proceedings, of separate actions consolidated for trial in lower court, as affected by failure to object seasonably to appellate procedure. 36 ALR 2d 849.

93-8004. (9732) Time for taking appeal.

Dismissal of Appeal

Where notice of appeal was not served in the time allowed by law, the Supreme Court is without jurisdiction and the appeal will be dismissed. *Malick v. Peterson*, 124 M 585, 228 P 2d 963.

Supreme Court Rule

Supreme Court Rule VI providing that the "transcript shall be served and filed within sixty days after the appeal is perfected or the appeal will be subject to dismissal on motion of the adverse party" has the force of a statute. *In re Hansen's Estate*, 128 M 270, 273 P 2d 103.

Time Limitation

Where the plaintiff failed to take his appeal within the statutory time limitation he could not obtain relief by a writ of review or a writ of supervisory control. *McVay v. McVay*, 128 M 31, 270 P 2d 393, 395.

Subd. 3—Appealable Orders

Order Denying Realtors' Motion to Strike from the Memorandum of Costs

An application for a writ of supervisory control will be denied since an appeal may

be taken from a special order made after judgment which modifies a judgment theretofore entered and adversely affects the rights of a party to the litigation. *State ex rel. Ferris v. District Court*, 126 M 623, 255 P 2d 687.

Cross-Reference

See note to sec. 93-8003. *Hart v. Baran*, 122 M 350, 204 P 2d 797, 805.

References

Cited or applied in *State ex rel. Sanford v. District Court*, 124 M 429, 225 P 2d 866, 868; *Little v. Little*, 125 M 278, 234 P 2d 832, 834; *Taylor v. Taylor*, 125 M 341, 238 P 2d 904, 905; *State ex rel. Reid v. District Court*, 126 M 489, 255 P 2d 693, 695; *Wilson v. Wilson*, 128 M 511, 278 P 2d 219, 221; *Fraser v. Clark*, 129 M 56, 282 P 2d 459, 460; *In re Hansen's Estate*, 129 M 261, 284 P 2d 1007, 1009; *State v. Zumwalt*, 129 M 529, 291 P 2d 257, 259; *Central Montana Stockyards v. Fraser*, 133 M 168, 320 P 2d 981, 984.

Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted. 10 ALR 2d 1075.

93-8005. (9733) Appeal—how taken.

Appeal from Part of Judgment

Where plaintiff was granted an absolute divorce from defendant wife and was ordered to pay her a sum of money in monthly installments, the plaintiff could appeal alone from that part of the judgment requiring the payment of the money. *Johnson v. Johnson*, — M —, 349 P 2d 310, 311, distinguished in 354 P 2d 186.

Service of Notice

The notice contemplated in this section is a legal notice which must be served in the manner provided in section 93-8502. *Malick v. Peterson*, 124 M 585, 228 P 2d 963.

The statute governing service of notice of appeal must be complied with in order to give the court jurisdiction. *McLeod v. McLeod*, 124 M 590, 228 P 2d 965.

Service of Notice Must be On All Adverse Parties

Where two defendants had filed motions for change of venue and the motion was granted as to one but denied as to the other and an appeal was taken from the order granting the motion, notice of appeal should have been given to both defendants, and Supreme Court was without jurisdiction where only defendant in whose favor the motion was granted was given

such notice. *McLeod v. McLeod*, 124 M 590, 228 P 2d 965.

Time for Filing Undertaking

Held: that where notice of appeal was served by mail on Monday, February 4, 1952, that day is excluded from computation in accordance with section 90-407 and defendants then had five full days commencing with Tuesday, February 5th within which to file the undertaking on appeal. As by section 59-510 office hours in public offices on Saturdays are from nine o'clock to twelve noon, the filing of the undertaking on Monday, February 11th complied with the Code. Appellants may not be cut off with but four days nor with only four and one-half days nor with any other time less than the five full days allowed by statute. *Fey v. A A Oil Corp.*, 126 M 552, 255 P 2d 339.

Who is an Adverse Party

An "adverse party" upon whom a notice of appeal is required to be served is one whose rights may be injuriously affected by a reversal or modification of the judgment from which the appeal is taken. *Reardon v. Gilligan*, 122 M 295, 202 P 2d 242, 244.

Where plaintiff alleged that he and defendant B jointly purchased land from the state with funds borrowed from defendant G in whose name deed was issued and prayed that the deed to G be declared a mortgage, and B answered denying any interest in the land, the administrator of B's estate (B having died) was an adverse party upon whom notice should have been served upon appeal by defendant G after judgment for plaintiff. *Reardon v. Gilligan*, 122 M 295, 202 P 2d 242.

An adverse party is a party who has an interest in opposition to the object sought to be accomplished by the appeal, or a party whose rights may be adversely affected by the reversal or modification of the judgment. *Central Montana Stock-*

yards v. Fraser, 133 M 168, 320 P 2d 981, 988.

In the case of an appeal from a judgment in an interpleader action giving plaintiff all the relief he asked for in his complaint, defendants who were defaulted in that action for failure to answer within the time allowed by law were not "adverse parties" on whom notice of appeal must be served. *Central Montana Stockyards v. Fraser*, 133 M 168, 320 P 2d 981, 988.

With respect to the definition of adverse parties upon whom notice must be served, this section and section 93-5605, relating to motion for new trial, are on the same footing. In *re Hardy's Estate*, 133 M 536, 326 P 2d 692, overruling *In re Roberts' Estate*, 102 M 240, 255, 58 P 2d 495.

Who is Entitled to Notice of Appeal

An adverse party within the meaning of the statute upon whom it is necessary to serve notice of appeal, is a party to a judgment whose rights may be injuriously affected by its reversal or modification, or one who has an interest in opposing the object sought to be accomplished by the appeal. Hence, one who would be benefited by a reversal is not an adverse party. *McNaught v. Weyh*, 128 M 418, 276 P 2d 491, 495.

References

Cited or applied in *State ex rel. Reid v. District Court*, 126 M 489, 255 P 2d 693, 695; *Benolken v. Miracle*, 128 M 262, 273 P 2d 667, 669; *Flynn v. Flynn*, 128 M 550, 281 P 2d 510; *Fraser v. Clark*, 129 M 56, 282 P 2d 459, 460; *Rader v. Taylor*, 134 M 419, 333 P 2d 480, 484.

Necessity of notice of application or intention to correct error in judgment entry in appellate and review proceedings. 14 ALR 2d 261.

93-8006. (9734) Undertaking or deposit on appeal.

Ambiguity in Undertaking

If there be any ambiguity in the undertaking so far as it relates to the super-sedeas, that would furnish no ground for the dismissal of the appeal for want of an

undertaking for costs. *Rader v. Taylor*, 134 M 419, 333 P 2d 480, 484.

References

Cited or applied in *Benolken v. Miracle*, 128 M 262, 273 P 2d 667, 669.

93-8007. (9735) Repealed.

Repeal

This section (Sec. 333, p. 202, L. 1867; Sec. 411, p. 151, L. 1877; Sec. 1, Ch. 75, L. 1959), relating to stay of proceedings on money judgments, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2707-9(d).

As amended in 1959, this section read as follows: "If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in the

amount named in the judgment or order plus interest at the legal rate for two years, plus estimated costs on appeal, in an amount to be fixed by the trial court; that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order

appealed from be for a greater amount than two thousand dollars (\$2,000.00), and the sureties do not state in their affidavits of justification accompanying the undertaking that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as in their affidavits they may state that they are severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken, pursuant to the stipulations herein designated."

Operation and Effect

Though this section may not provide a stay of execution in case a writ of mandate is issued by a district court to compel the issuance of a license, the supreme court may nevertheless issue any appropriate writ to insure an appeal. *Gill v. Rafn*, 133 M 505, 326 P 2d 974.

93-8008 to 93-8010. (9736 to 9738) Repealed.

Repeal

These sections (Secs. 334 to 336, p. 202, L. 1867; Secs. 412 to 414, pp. 151, 152, L. 1877), relating to stay of proceedings on judgments for delivery of documents or

property, execution of conveyance, and sale of real property, were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2707-9(d).

93-8011. (9739) Stay of proceedings—court may limit security.

Jurisdiction of District Court

Upon an appeal being taken, jurisdiction thereof passes from the district court to the Supreme Court, subject to right of district court to correct clerical errors. *Polson v. Thomas*, — M —, 357 P 2d 349, 350.

Modification of Child Custody Decree

An appeal from an order modifying a divorce decree as to custody of children does not stay the enforcement of the order. Such order can only be stayed by an application for an order staying the proceedings under section 93-8003, subd. 2. Application of *Nelson*, 132 M 252, 316 P 2d 1058, 1059.

Operation and Effect

On appeal from a change of venue the court has jurisdiction not only to hear and determine the appeal but also to hear, determine and act upon any incidental matters arising while the appeal is pending and that may ultimately affect the rights of the parties litigant. Thus the Supreme Court has the power to consider and determine a motion to dissolve the attachment. *Fraser v. Clark*, 128 M 160, 273 P 2d 105, 114. (Dissenting opinion, 128 M 160, 273 P 2d 105, 120.)

Where a notice of appeal from a judgment was served and filed, jurisdiction over the parties to the controversy and

the subject-matter thereof passed from the district court and vested in the Supreme Court. It then became the duty of the Supreme Court to maintain the status quo of the parties and their rights until the controversy could be determined in this court, so that rights involved in such appeal may not be lost or prejudiced prior to such determination. *Benolken v. Miracle*, 128 M 262, 273 P 2d 667, 669.

Where an appeal was taken from an order appointing a person executor, the district court and its clerk were then without jurisdiction to issue letters testamentary to the executor and allowing him to qualify. In *re Hansen's Estate*, 129 M 261, 284 P 2d 1007, 1010.

Stay of Proceedings in Lower Court on Appeal

Where an appeal is taken from a judgment declaring ownership of certain cattle and the general recorder of marks and brands held money derived from the sale of such cattle and which he deposited with the district court, the ownership and right to possession of the money was a matter embraced within the action and judgment and the lower court will be stayed from distributing such money pending determination of the appeal. *Benolken v. Miracle*, 128 M 262, 273 P 2d 667, 670.

93-8014. (9742) Cases in which stay of proceedings not allowed.**Operation and Effect**

The issuance of letters testamentary after an appeal had been taken from the order of appointment of an executor and all acts done pursuant to the letters so issued were beyond the jurisdiction of the district court and void. Section 93-8016 does not save the action as the executor had not qualified by the time of the taking of the appeal. *In re Hansen's Estate*, 129 M 261, 284 P 2d 1007, 1010.

Where writ of prohibition was issued against liquor control board prohibiting the issuance of licenses except to persons who have permits and a writ of mandate was also issued compelling the issuance of licenses to certain persons, which writs were complied with after the district court refused to stay the writs; the questions on appeal were moot. *State ex rel. Hag-*

erty v. Rafn, 130 M 554, 304 P 2d 918, distinguished in 348 P 2d 799. (Dissenting opinion, 130 M 554, 304 P 2d 918 at 921.)

Though this section may not provide a stay of execution in case a writ of mandate is issued by a district court to compel the issuance of a license, the supreme court may nevertheless issue any appropriate writ to insure an appeal. *Gill v. Rafn*, 133 M 505, 326 P 2d 974, distinguished in 348 P 2d 799.

Prohibitory Injunction

The Supreme Court is not empowered to stay, pending an appeal, the operation of a perpetual prohibitory injunction ordered in a final judgment in the district court. *Brackman v. Kruse*, 122 M 91, 199 P 2d 971.

93-8016. (9744) Acts of same valid when appointment vacated.**Construction**

The district court proceeded without jurisdiction when its clerk issued letters testamentary to a person appointed executor when an appeal was taken from the order appointing such person executor and such appeal was taken before the executor qualified. Neither his letters nor his acts done thereunder are saved by this section inasmuch as he never qualified. *In re Hansen's Estate*, 129 M 261, 284 P 2d

1007, 1010.

Held, that where a person was appointed administrator, but before he qualified, an appeal was taken from the order appointing him administrator, such person could not then qualify and enter into administration of the estate for at the time of attempting to qualify the district court had lost jurisdiction of the matter because of the appeal. *In re Hansen's Estate*, 129 M 261, 284 P 2d 1007, 1010.

93-8017. (9745) Record on appeal from orders other than new trial.**Failure to Amend Bill of Exceptions by Adverse Party**

Where an adverse party did not propose amendments to a bill of exceptions and did not suggest diminution of the record prior to submission of the cause to the reviewing court, the respondent could not be heard to say that the bill did not contain all the proceedings at the trial. *Deich v. Deich*, — M —, 323 P 2d 35, 47.

Operation and Effect

The bill of exceptions referred to in this section is the bill of exceptions prepared under the provisions of section 93-5505. *Deich v. Deich*, — M —, 323 P 2d 35, 48.

References

Cited or applied in *Flynn v. Flynn*, 128 M 550, 281 P 2d 510; *Hansen v. Hansen*, 129 M 516, 290 P 2d 438, 439.

93-8018. (9746) Authentication of copies—abbreviated record.**Operation and Effect**

A transcript on appeal must be certified to be correct by either the clerk of the trial court or by the attorneys in the case, and if it is not done, a motion to dismiss is well founded. *Kemp v. Murphy*, 125 M 234, 233 P 2d 824, 826.

References

Cited or applied in *Hansen v. Hansen*, 129 M 516, 290 P 2d 438, 439.

93-8019. (9747) When an appeal may be dismissed.**Failure to File Transcript**

Where no extension of time was requested nor allowed for the filing of appellant's transcript on appeal, the appeal must be dismissed. *First National Bank of*

Missoula v. Mercer, 128 M 535, 279 P 2d 695, 697.

Justiciable Controversy

The Supreme Court may dismiss an ap-

peal of its own motion when it finds that there is no justiciable controversy. *Gill v. Rafn*, 133 M 505, 326 P 2d 974, distinguished in 348 P 2d 799.

Laches in Preparing Transcript

On motion to dismiss appeal the fact that appellant did obtain an order from the trial court purporting to extend the time may be considered in determining whether she was guilty of laches in preparing her transcript on appeal. *Rader v. Taylor*, 134 M 419, 333 P 2d 480, 483.

Operation and Effect

A motion to dismiss an appeal on the grounds that no transcript or brief of appeal had been served or filed by the

appellants within the time prescribed by the rules of the Supreme Court will be denied when it appears that prior to the consideration of the motion to dismiss the appellant's transcript had been filed with the Supreme Court and the record perfected to the satisfaction of the court and the delay in filing such transcript has been without laches on the part of the appellants. *McNaught v. McCahan*, 126 M 616, 250 P 2d 912, 913.

References

Cited or applied in *Fey v. A A Oil Corp.*, 126 M 552, 255 P 2d 339, 341; *Flynn v. Flynn*, 128 M 550, 281 P 2d 510; *Deich v. Deich*, — M —, 323 P 2d 35, 48.

93-8020. (9748) Effect of dismissal.

Operation and Effect

In the absence of fraud, perjury or other collusive action, after the Supreme Court's dismissal of an appeal from the district court's judgment denying a petition for a writ of mandate, such judgment could not again be challenged by another action in the district court. *Gray v. Bohart*, 131 M 522, 312 P 2d 529, 530.

Subsequent Appeal

Where appeal was dismissed a subsequent appeal taken from the same judgment within the time allowed for taking

appeals must likewise be dismissed. *Libin v. Huffine*, 124 M 361, 224 P 2d 144.

If plaintiffs are aggrieved by dismissal, their remedy is to promptly apply to Supreme Court to have order of dismissal modified and not to take another appeal from the same judgment. *Libin v. Huffine*, 124 M 361, 224 P 2d 144, 146.

References

Cited or applied in *State ex rel. Reid v. District Court*, 126 M 489, 255 P 2d 693, 701, 705; *Deich v. Deich*, — M —, 323 P 2d 35, 48.

93-8021. (9749) Supplementing defective record.

References

Cited in *In re Hall's Estate*, 124 M 355, 224 P 2d 138, 140; *Deich v. Deich*, — M —, 323 P 2d 35, 48.

93-8023. (9751) Ruling against respondent may be reviewed.

Cross-appeal When Necessary

This section does not do away with the necessity for cross-appeals in cases where in a party feels himself aggrieved by rulings on matters separate and distinct from those sought to be reviewed by appellant. *Francisco v. Francisco*, 120 M 468, 191 P 2d 317, 319, 1 ALR 2d 625.

In action to foreclose lien by taker up of animals under section 46-1410, where defendant appealed but plaintiff did not cross-appeal, a cross-assignment of error by plaintiff contending that allowance of ten cents per goat per day for caring for animals was not a reasonable allowance but that allowance should have been fifty cents per goat per day, could not be considered since the error was not of a compensatory character. *Doornbos v. Ihde*, 124 M 570, 228 P 2d 235, 237.

Failure to Make Assignment of Error or Cross Assignment of Error

Where appellant did not make an assignment of error, the court will likewise excuse the failure of the respondent to make a cross assignment of error. *National Surety Corp. v. Kruse*, 121 M 202, 192 P 2d 317, 318.

Irregularity in Jury Proceedings

Affidavit of eight of the jurors, who were enough to render a verdict, stated that they were not in disagreement as to what the evidence showed. The only jurors who desired some or all of the testimony read were those who finally voted against the verdict. They had hoped to influence the other jurors to change their minds by having testimony read. The other jurors, being two-thirds of them,

stated definitely that their verdict would not have been different had the testimony or any part of it been read to them. The irregularity, if it actually existed, did not affect verdict and was not cause for reversal where it was clear that it did not affect substantial right of plaintiff. *Gali-*

ger v. Hansen, 133 M 34, 319 P 2d 1051, 1055.

References

Cited or applied in *Sheridan County Electric Co-op. v. Anhalt*, 127 M 71, 257 P 2d 889, 893.

93-8024. (9752) Remedial powers of an appellate court.

Operation and Effect

Where district court issued a writ of prohibition prohibiting the liquor control board from issuing licenses to persons other than those who had permits, and also issued a writ of mandate directing the issuance of licenses to certain persons, which writs the court refused to stay pending appeal, and the parties to whom the licenses were issued engaged in the business of selling liquor at retail; the questions on appeal are moot, since the court on appeal could not restore the parties to the status quo and could not effect restitution. *State ex rel. Hagerty v. Rafn*, 130 M 554, 304 P 2d 918, distinguished in 348 P 2d 799. (Dissenting opinion, 130 M 554, 304 P 2d 918 at 921.)

While the subject of the controversy and the parties are before the court it has jurisdiction to enforce restitution of an amount lost through the enforcement of a judgment subsequently reversed. *Waggoner v. Glacier Colony of Hutterites*, 131 M 525, 312 P 2d 117, 118.

Order of Restitution

District court erred in refusing motion

of appellant for order of restitution in proceedings dissolving partnership between two brothers, in which one of them pursuant to original judgment of the district court obtained possession and control over all of the property of the partnership save that portion paid into court in an attempt to satisfy the judgment in respect to appellant, the other brother, where there was an unjust benefit conferred upon purchaser as a result of the district court's judgment. He had no legal right to the amount given him of the proceeds of the partnership and the judgment had been modified declaring appellant the owner of certain property previously paid over to the purchaser. *Hanson v. Hansen*, 134 M 290, 329 P 2d 791.

Rights Subject of Restitution

The right of the Montana liquor control board to deny a license is not personal to the members or of such nature that it may be subject of restitution under this section. *Gill v. Rafn*, 133 M 505, 326 P 2d 974.

93-8025. (9753) Remittitur must be certified to the clerk, etc.

Error in Entry by Court Below

Where Supreme Court, on appeal, by its judgment and remittitur, modified the judgment of the lower court, an entry by the lower court to the effect that its former judgment "stand for naught" is error and can be corrected. *Hansen v. Hansen*, 130 M 496, 304 P 2d 1107, 1108.

Operation and Effect

The entry of the judgment rendered by the Supreme Court by the clerk of the district court as directed by statute ipso

facto modifies the judgment theretofore entered by the district court; and the judgment of the Supreme Court so entered becomes the final judgment in the cause. *Hansen v. Hansen*, 130 M 496, 304 P 2d 1107, 1108.

References

Cited or applied in *Minerals Engineering Co. v. Greene*, 131 M 119, 308 P 2d 977, 982; *Hanson v. Hansen*, 134 M 290, 329 P 2d 791, 793.

CHAPTER 82—OFFER OF DEFENDANT TO COMPROMISE

(Repealed—Section 84, Chapter 13, Laws of 1961)

93-8201. (9770) Repealed.

Repeal

This section (Sec. 368, p. 209, L. 1867; Sec. 458, p. 163, L. 1877), relating to proceedings on offer of the defendant to compromise after suit brought, was repealed by Sec. 84, Ch. 13, Laws 1961, ef-

fective January 1, 1962. For new provisions, see sec. 93-2708-5.

Operation and Effect

An "offer to do equity" in the answer when not accepted can not be used in evi-

dence nor can it be regarded as an admission that defendants had waived any of

their defenses. *Rachou v. McQuitty*, 125 M 1, 229 P 2d 965.

CHAPTER 83—INSPECTION OF WRITINGS

(Repealed—Section 84, Chapter 13, Laws of 1961)

93-8301. (9771) Repealed.

Repeal

This section (Sec. 421, p. 220, L. 1867; Sec. 9, p. 11, L. 1881), relating to inspection of writings, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-9.

Showing of Relevance and Admissibility

Even if this section is made applicable to criminal cases by section 94-7209, defendant was not entitled to the inspection of written materials, where there was no showing as to what the material consisted of, whether it was relevant to the defense or that it was admissible in evidence. *State ex rel. Keast v. District Court*, 135 M 545, 342 P 2d 1071.

CHAPTER 84—MOTIONS AND ORDERS

93-8401. (9772) Repealed.

Repeal

This section (Sec. 486, p. 231, L. 1867; Sec. 469, p. 166, L. 1877), defining "order" and "motion," was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2703-1(b).

Denial of Petition for Writ of Prohibition

Denial of petition for writ of prohibition by district court to restrain justice court from further proceedings in criminal action was an order and not a judgment. *State ex rel. Aho v. Justice Court of Laurel Township*, 131 M 585, 313 P 2d 542, 543.

Motions

A motion is not made by merely filing an application in writing with the clerk of the district court, but by the moving of the court or judge viva voce, to grant the order. *State ex rel. McVay v. District Court*, 126 M 382, 251 P 2d 840, 846.

As a motion is not an action but simply an application for an order it is not subject to the general rules of pleading. *State ex rel. McVay v. District Court*, 126 M 382, 251 P 2d 840, 846.

Since, ordinarily no question not open on the hearing of the original or main motion is presented for decision by a motion to quash, dismiss, deny or strike from the files or records the original motion or by a demurrer to such original motion, such motion or demurrer is regarded as superfluous, frivolous, confusing and bad practice. *State ex rel. McVay v. District Court*, 126 M 382, 251 P 2d 840, 846.

References

Cited or applied in *State ex rel. Gilreath v. District Court*, 127 M 431, 265 P 2d 651, 654 (dissenting opinion).

Motion in original action as proper remedy to avoid release or satisfaction of judgment. 9 ALR 2d 558, 561.

93-8402. (9773) Motions and orders—absence of judge.

Orders by a Substituted Judge

Where a substitute judge is appointed because of the disqualification of the original judge, the substituted judge is competent to make orders and rule on motions until there is a complete disposition of the case as far as the trial court

is concerned. *McLeod v. McLeod*, 126 M 32, 243 P 2d 321.

References

Cited or applied in *State ex rel. Gilreath v. District Court*, 127 M 431, 265 P 2d 651, 654 (dissenting opinion).

93-8403. (9774) Repealed.

Repeal

This section (Sec. 488, p. 231, L. 1867; Sec. 471, p. 166, L. 1877; Sec. 1, Ch. 17, L. 1943), relating to notice of motion, was

repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2702-4(d) and (e).

References

Cited or applied in State ex rel. Gil-

reath v. District Court, 127 M 431, 265 P 2d 651, 654 (dissenting opinion).

93-8405. (9776) Order made out of court, etc.**Extension of Time for Filing Bill of Exceptions**

If court erroneously made order extending the time to prepare, serve and file bill of exceptions under section 93-5505, it had authority to correct such order under the provisions of this section. *Barcus v. Portland Cattle Co.*, 122 M 534, 207 P 2d 565, 566.

Objection to Order

Where order of court on application to perpetuate testimony was complained of the remedy was to apply to the court to vacate or modify the order and not by direct application for certiorari in the supreme court. *State ex rel. Woodard v. District Court*, 120 M 585, 189 P 2d 998, 1001; *State ex rel. Lichte v. District Court*, 121 M 34, 189 P 2d 1004, 1008.

CHAPTER 85—NOTICES AND FILING AND SERVICE OF PAPERS**93-8501 to 93-8504. (9778 to 9781) Repealed.****Repeal**

These sections (Secs. 491 to 493, p. 232, L. 1867; Secs. 474 to 477, pp. 166, 167, L. 1877; Sec. 2, Ch. 17, L. 1943), relating to service of notices and papers, were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2702-3 and 93-2702-4(e).

References

Cited or applied in *Fey v. A A Oil Corp.*, 126 M 552, 255 P 2d 339, 341.

Necessity, in service by leaving process at place of abode, etc., of leaving a copy of summons for each party sought to be served. 8 ALR 2d 343.

What amounts to doing business in a state within statute providing for service of process in action against nonresident, natural person, or persons doing business in state. 10 ALR 2d 200.

Service by Mail

Where the attorneys for the respondents resided in and maintained their offices in the same place where appellant's attorneys reside, a notice of appeal by mail was insufficient. *Malick v. Peterson*, 124 M 585, 228 P 2d 963.

93-8505. (9782) Appearance—notices after appearance.**Motion to Strike**

Defendants filing motion to strike portions of plaintiff's complaint made their general appearance in the case. *Johnson v. Clark*, 131 M 454, 311 P 2d 772, 774.

notice of appeal. *Malick v. Peterson*, 124 M 585, 228 P 2d 963.

References

Cited in *McLeod v. McLeod*, 124 M 590, 228 P 2d 965.

Operation and Effect

Attorneys appearing were entitled to

93-8506. (9783) Service on nonresidents—where a party, etc.**Operation and Effect**

This section will not permit the constructive service of an order to show cause

on a motion to modify the custody provisions of a divorce decree. *Hand v. Hand*, 131 M 571, 312 P 2d 990, 994.

93-8507. (9784) Repealed.**Repeal**

This section (Sec. 480, p. 168, L. 1877), excepting process from this chapter, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2702-3.

References

Cited or applied in *Hand v. Hand*, 131 M 571, 312 P 2d 990, 994.

CHAPTER 86—COSTS AND DISBURSEMENTS—COST BILL—SUIT
IN FORMA PAUPERIS**93-8601. (9786) Compensation of attorneys—costs to parties.**

Attorney's Fees Incurred in Condemnation Proceeding for a Private Road of Necessity Not Recoverable

Attorney's fees incurred in the defense of a condemnation proceeding for a private road of necessity under section 93-9923 are not recoverable as an expense

of such action under this section or section 93-8618. *Tomten v. Thomas*, 125 M 159, 232 P 2d 723, 725, 26 ALR 2d 1285.

References

Cited in *In re Sikorski's Estate*, 127 M 563, 268 P 2d 395, 399.

93-8602. (9787) When allowed, of course, to the plaintiff.**Subd. 2****Operation in General**

In an action in claim and delivery to recover the possession of machinery, where a verdict was directed for plaintiff and plaintiff had failed to offer proof of the value of the machinery, the court should not have made any allowance of costs to the plaintiff. *Key v. Clements*, 133 M 344, 323 P 2d 603, 608.

Subd. 4**Prohibition Cases**

If pleaded, attorney fees are allowable as an item of damages in prohibition cases. *State v. District Court*, 131 M 397, 310 P 2d 779, 782.

References

Cited or applied in *Letz v. Letz*, 123 M 494, 215 P 2d 534.

93-8604. (9789) Costs—when in the discretion of the court.

Allowance of attorneys' fees in, or other costs of, litigation by beneficiary respecting trust. 9 ALR 2d 1132.

93-8607. (9792) Repealed.**Repeal**

This section (Sec. 476, p. 229, L. 1867; Sec. 488, p. 169, L. 1877), relating to ref-

erees' fees, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-16(a).

93-8611. (9796) Costs in a review other than by appeal.**Operation and Effect**

Prevailing party in proceeding for review of contempt judgment by writ of

certiorari is entitled to recover its costs in the action. *State ex rel. Porter v. First Judicial Dist.*, 123 M 447, 215 P 2d 279.

93-8614. (9799) Filing costs and attorney's fees to be recovered, etc.**Operation and Effect**

Where a house owner entered into a contract to erect a house in reliance on a lumber company's manager's representations that it was backing the contractor, and where the house owner paid the contractor, the lumber company was not entitled to a lien for materials, and the house owner was entitled to a judgment for the

amount paid above the contract price and for attorney's fees. *Monarch Lumber Co. v. Wallace*, 132 M 163, 314 P 2d 884, 890.

Where the evidence indicated that there was no lien to be foreclosed, as a matter of law, the defendant was allowed attorney's fee. *Thompson v. Cure*, 133 M 273, 322 P 2d 323.

93-8618. (9802) What are costs and disbursements.**What are Allowable Costs**

The reasonable expenses for making a map if required or necessary is a proper cost; hence where a map was prepared, introduced in evidence and much testimony was adduced with reference thereto and at a hearing on a motion to tax the cost, evidence was introduced as to reasonable expenses therefor, it was incumbent upon the opposing party to overcome the prima facie evidence that the amount named in the cost bill was neces-

sarily expended. *Perkins v. Stephens*, 131 M 138, 308 P 2d 620, 624.

What are Not Allowable Costs

Attorney's fees incurred in the defense of a condemnation proceeding for a private road of necessity under section 93-9923 are not recoverable as an expense of such action under this section or section 93-8601. *Tomten v. Thomas*, 125 M 159, 232 P 2d 723, 725, 26 ALR 2d 1285.

93-8619. (9803) Bill of costs.**Correctness of Memorandum—Burden of Proof**

Verified memorandum is *prima facie* evidence of correctness of items of disbursements and the burden of overcoming such *prima facie* case rests on the adverse party, the party filing the memorandum being required to furnish further proof only in rebuttal. *Letz v. Letz*, 123 M 494, 215 P 2d 534.

Motion to Strike Memorandum

Motion to strike plaintiff's memorandum of costs was properly denied where findings of fact and conclusions of law were signed on August 25, 1955, and filed on August 26; judgment was filed September 15; cost bill was served on counsel on September 16, and filed September 19; and notice of entry of judgment was served

on September 15, reciting that judgment was entered on that day. *Pattyn v. Favers*, 133 M 560, 327 P 2d 818, 821.

Timely Filing of Memorandum of Costs

A cost bill was filed in time where the court made findings of fact and conclusions of law on April 18 and filed them on April 21, the judgment was signed April 28 and filed April 29, and plaintiff filed his memorandum of costs on April 29. *Ballenger v. Tillman*, 133 M 369, 324 P 2d 1045, 1052.

References

Cited or applied in *Tomten v. Thomas*, 125 M 159, 232 P 2d 723, 724, 26 ALR 2d 1285; *Wilson v. Wininger*, — M —, 345 P 2d 374, 377.

93-8625. (9809) Poor person may sue without costs.

Right to sue in forma pauperis as dependent on showing of financial disability

of attorney or other non-party who are non-applicants. 11 ALR 2d 607.

CHAPTER 87—GENERAL PROVISIONS

93-8702. (9817) Lost papers—how supplied.**Operation and Effect**

This section authorizes the trial judge to proceed with the trial on substituted carbon copies of the papers and pleadings

rather than the original where the original papers and pleadings were missing. *Mortenson v. Mortenson*, 129 M 290, 285 P 2d 834, 835.

93-8705. (9820) Repealed.**Repeal**

This section (Sec. 497, p. 232, L. 1867), relating to consolidation of actions, was

repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-5(a).

93-8706. (9821) Actions—when deemed pending.**Operation and Effect**

Where company went upon land six days after entry of district court judgment quieting title and expended large sums of money drilling well it acted at its peril where case was thereafter appealed and reversed. *Rieckoff v. Consolidated Gas Co.*, 123 M 555, 217 P 2d 1076, 1080.

References

Cited in *Trudgen v. Trudgen*, 134 M 174, 329 P 2d 225, 231; *Barbour v. Barbour*, 134 M 317, 330 P 2d 1093, 1096.

93-8708. (9823) Extension of time.**Application**

It is doubtful whether the legislature intended when it amended section 93-5505 to still have this section operate as a further limitation upon the court in granting extensions of time for a bill of exceptions. *State ex rel. Robbins v. Bonner*, 128 M 45, 270 P 2d 400, 402.

strike a bill of exceptions that because an extension of time could not exceed 90 days without the consent of the adverse party, pursuant to section 93-8708, and because he could not get an extension until a new attorney for the adverse party was appointed, pursuant to section 93-2104, he was prevented from making a timely filing of his bill. Even though appellee's attorney may have died, section 93-2104 is not designed to enable a prospective appellant to disregard the time limitation on filing a

Death of Attorney for Adverse Party

There was no merit to an appellant's argument in opposition to a motion to

bill, by delaying notice to the adverse party to appoint a new attorney. *Berg v. Fraser*, — M —, 349 P 2d 317, 319.

Notice of Appeal

This section makes it clear that the time prescribed by law for the serving of notices of appeal may not be extended thereunder for notices of appeal are specifically excluded from the operation of the statute. Thus are the courts denied the authority to extend the maximum time prescribed by statute for the service or filing of a notice of appeal. *State ex rel. Reid v. District Court*, 126 M 489, 255 P 2d 693, 699.

Operation and Effect

This section and section 93-5505 are special statutes pertaining to the prepara-

tion and extension of time for the service and filing of bills of exceptions, and by the well-established rule of construction in this state, control over general statutes. Thus where a party did not present his bill of exceptions within fifteen days or get an extension of time for presenting the bill of exceptions, he could not rely on section 93-3905 pertaining to a court giving relief to a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 992, 994, 995.

References

Cited or applied in *State ex rel. Doyle v. District Court*, 126 M 615, 245 P 2d 382.

93-8718. (9833) Publication of order, etc., to be made once a week, etc.

Validity of legislation relating to publication of legal notices. 26 ALR 2d 655.

CHAPTER 89—UNIFORM DECLARATORY JUDGMENTS ACT

93-8901. (9835.1) Scope.

Application

If a governmental board delays unreasonably in instituting legal action seeking enforcement of its order and compliance with section 50-435, which requires coal mines to erect washrooms if they have more than 12 employees, the coal mine may institute an action at law for declaratory judgment under section 93-8901 et seq. *Jeffries Coal Co. v. Industrial Accident Board*, 126 M 411, 252 P 2d 1046, 1048.

Finding of Facts Required

In order to sustain a declaratory judgment the court must first have made findings of fact upon which the judgment could be based and the findings of fact cannot go outside the issues formulated by the pleadings. *National Surety Corp. v. Kruse*, 121 M 202, 192 P 2d 317, 319.

General Powers

The question as to whether property leased to a school district was exempt from taxation was proper to adjudicate in a declaratory judgment proceeding. *Northwestern Improvement Co. v. Rosebud County*, 129 M 412, 288 P 2d 657, 659.

Operation and Effect

The judicial power under this act ex-

tends only to actual cases and controversies and not to abstract questions. *Chovanak v. Matthews*, 120 M 520, 188 P 2d 582, 586.

Suits against tax officials based upon the illegality of their action in assessing or collecting taxes are not considered suits against the state, so that it is not necessary for the plaintiff to allege that the state has consented to be sued under the Uniform Declaratory Judgment Act of Montana. *Brophy Coal Co. v. Matthews*, 125 M 212, 233 P 2d 397, 399.

Relief against covenant restricting right to engage in business or profession as subject of declaratory judgment. 10 ALR 2d 743.

Extent to which principles of res judicata are applicable to judgments in actions for declaratory relief. 10 ALR 2d 782.

Tax question as proper subject of action for declaratory judgment. 11 ALR 2d 359.

Declaratory relief with respect to unemployment compensation. 14 ALR 2d 826.

Issue as to negligence as proper subject of declaratory judgment action. 28 ALR 2d 957.

Partnership or joint venture matters as subject of declaratory judgment. 32 ALR 2d 970.

93-8902. (9835.2) Power to construe, etc.

Oral Contract

An action for a declaratory judgment can be maintained to interpret an oral

contract. *Carpenter v. Free*, — M —, 357 P 2d 882, 883.

Persons Entitled to Bring Action

A decision on the constitutionality of a statute cannot be obtained under the Declaratory Judgment Act by a person who has no interest in the question except that of a "resident, citizen, taxpayer and elector." *Chovanak v. Matthews*, 120 M 520, 188 P 2d 582.

93-8903. (9835.3) Before breach.**References**

Cited or applied in *Northwestern Im-*

References

Cited or applied in *Northwestern Improvement Co. v. Rosebud County*, 129 M 412, 288 P 2d 657, 659.

Relief against covenant restricting right to engage in business or profession as subject of declaratory judgment. 10 ALR 2d 743.

93-8904. (9835.4) Declarations concerning administration of trusts, etc.**References**

Cited or applied in *Northwestern Im-*

provement Co. v. Rosebud County, 129 M 412, 288 P 2d 657, 659.

provement Co. v. Rosebud County, 129 M 412, 288 P 2d 657, 659.

93-8905. (9835.5) Enumeration not exclusive.**Construction**

The question as to whether property leased to a school district was exempt from taxation was proper to adjudicate in

a declaratory judgment proceeding. *Northwestern Improvement Co. v. Rosebud County*, 129 M 412, 288 P 2d 657, 659.

93-8911. (9835.11) Parties.

Burden of proof in actions under general declaratory judgment acts. 23 ALR 2d 1243.

93-8912. (9835.12) Construction.**References**

Cited or applied in *Northwestern Im-*

provement Co. v. Rosebud County, 129 M 412, 288 P 2d 657, 659.

CHAPTER 90—CERTIORARI (WRIT OF REVIEW)**93-9001. (9836) Writ of review defined.****Cross-Reference**

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

Operation and Effect

Certiorari is an extraordinary remedy and the proceeding under the writ is a special proceeding. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 765.

93-9002. (9837) When and by what courts granted.**Applicable to Quasi-Judicial Bodies**

A proceeding under this section seeking a writ of review of the action of the state livestock sanitary board is proper. *State ex rel. Lee v. State Livestock Sanitary Board*, — M —, 357 P 2d 685, 688.

Grounds for Writ

The power of a court of review to issue a writ of certiorari is limited and the writ may be granted only when there has been an excess of jurisdiction. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 765.

Review of Contempt

The only method to review an adjudication for contempt is by writ of certiorari. *State ex rel. Porter v. First Judicial Dist.*, 123 M 447, 215 P 2d 279.

References

Cited or applied in *State ex rel. Reid v. District Court*, 126 M 489, 255 P 2d 693, 704.

Motion to Quash Writ of Review

On motion to quash a writ the court must accept the allegations of the petition as stating the facts. Application of *Banschbach*, 133 M 312, 323 P 2d 1112, 1113.

Not Available to Correct Errors within Jurisdiction

The writ of certiorari cannot be employed to correct errors committed in the exercise of jurisdiction. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 766.

Not Available When Time for Appeal Permitted to Lapse

The aggrieved party may not permit the time for taking an appeal to lapse and then have the judgment or order against him reviewed and annulled on writ of certiorari. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 766.

Not Available Where Error may be Reached by Appeal

District court exceeded its jurisdiction by issuing a writ of review and making orders against the justice of the peace when the record shows that (1) the justice of the peace was acting within his jurisdiction, (2) that the defendants may appeal to the district court from any judgment entered against them in the justice's court, (3) that on such appeal the cause will be tried anew in the district court, and (4) that such remedies so available to defendants are plain, speedy and adequate. *State ex rel. Borberg v. District Court*, 125 M 481, 240 P 2d 854, 861, distinguished in 300 P 2d 953.

Operation and Effect

Writ of review is not available where the plaintiff simply did not take his appeal within the statutory time of 60

days under section 93-8004. *McVay v. McVay*, 128 M 31, 270 P 2d 393, 395.

What Must Be Shown to Obtain This Writ

To obtain relief by writ of certiorari three essentials must coexist, namely, excess of jurisdiction, absence of right to appeal and lack of a plain, speedy and adequate remedy other than certiorari. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 765.

When Remedy Is Not Proper

The writ will not be granted for the correction of merely harmless, technical or formal errors which are not shown to have resulted prejudicially, or to have caused substantial injustice to the relator. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 766.

Where intermediate judgment requiring the payment of alimony pendente lite in action for divorce was not appealed, it cannot be reviewed and annulled on writ of certiorari after judgment for contempt. *State ex rel. Houtchens v. District Court*, 122 M 76, 199 P 2d 272, 274.

The writ cannot be used to correct errors within jurisdiction. Application of *Banschbach*, 133 M 312, 323 P 2d 1112, 1113.

93-9003. (1983) Application for—how made.**References**

Cited in *State ex rel. Walker v. Board of Comrs.*, 120 M 413, 187 P 2d 1013, 1014.

93-9004. (1983) The writ to be directed to the inferior tribunal, etc.**References**

Cited in *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 765.

93-9005. (1984) Contents of the writ.**References**

Cited in *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 765.

93-9008. (1984) The review under the writ, extent of.**Excess of Jurisdiction**

The power of a court of review to issue a writ of certiorari is limited and the writ may be granted only when there has been an excess of jurisdiction. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 765.

A writ of certiorari to review judgment of contempt can only be made when there is a showing that the tribunal acted in excess of jurisdiction. *State ex rel. Porter v. First Judicial Dist.*, 123 M 447, 215 P 2d 279.

Scope of Review

The hearing in a certiorari proceeding is limited to a review of the record of the inferior tribunal, board or officer for the sole purpose of determining from such record whether the tribunal, board or officer had jurisdiction to do the act, to make the order or to render the judgment of which complaint is made. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 766.

Existence of jurisdictional facts found by inferior tribunal as subject of inquiry on certiorari. 5 ALR 2d 675.

93-9011. (9846) Judgment roll.**Operation and Effect**

This section must be construed with other statutes relating to appeal and effect given to all as if they were all parts of the same statute. State ex rel. Walker v. Board of Comrs., 120 M 413, 187 P 2d 1013, 1015, distinguished in 158 F Supp 246.

Papers in Judgment Roll

While this section sets forth the minimum contents of the judgment roll, it

does not follow that only the papers there-in enumerated may be incorporated in the judgment roll. State ex rel. Walker v. Board of Comrs., 120 M 413, 187 P 2d 1013, 1015.

Special Proceeding

When there is an appeal from a final judgment entered in a special proceeding the judgment roll is that described in section 93-5707. State ex rel. Walker v. Board of Comrs., 120 M 413, 187 P 2d 1013, 1015.

CHAPTER 91—MANDAMUS (WRIT OF MANDATE)**93-9101. (9847) Mandate defined.****Cross-Reference**

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

References

Cited or applied in State ex rel. Reid v. District Court, 126 M 489, 255 P 2d 693, 704.

93-9102. (9848) When and by what court issued.**Bridge Repairs**

On appeal from a mandamus proceeding to force state water conservation board to repair and rebuild bridges over ditch, owned by the board where it crosses city streets, before the Supreme Court could affirm the judgment of the district court it had to be shown that some law enjoined upon board an affirmative duty to repair the bridges in question. State ex rel. Livingston v. State Water Conservation Board, 134 M 403, 332 P 2d 913, 915, 916.

edy in the ordinary course of law. State ex rel. Kennedy v. District Court, 121 M 320, 194 P 2d 256, 261, 2 ALR 2d 1050.

The writ of mandamus is available only where there is no speedy or adequate remedy in the ordinary course of law. Stewart v. State, 135 M 323, 340 P 2d 151.

Inadequate Right of Appeal

The mere existence of a right of appeal, where it is inadequate, does not preclude the issuance of a writ of mandate. State v. State Highway Patrol, 133 M 162, 321 P 2d 612, 614.

Collection of Tax Penalty

Where the state board of equalization followed the provisions of section 84-4924 in assessing a 100% penalty for failure to pay income tax, no grounds for issuance of the writ were stated. Stewart v. State, 135 M 323, 340 P 2d 151.

Mandamus Lies to Compel Calling in of Another Judge

Mandamus is the proper remedy where a district judge fails to call in another district judge after an affidavit of bias has been filed under section 93-901. State ex rel. Coleman v. District Court, 120 M 372, 186 P 2d 91, 94.

Contracts of Teachers

Where nonunion schoolteachers were offered a salary increase only if they signed a contract which contained a union security clause, they were entitled to bring a mandamus action against the school district to obtain a judgment declaring that they could not be discriminated against, compelling the district to enter into contracts with them, and ruling that the union security provision was void. Benson v. School Dist. No. 1 of Silver Bow County, — M —, 344 P 2d 117.

Mandamus Lies to Compel District Court to Allow Filing of New Information

An original proceeding for a writ of mandamus directed to the judge of a district court was proper in a case where it was sought to compel the court to allow the filing of a new information in a prosecution against three juvenile defendants for robbery. State ex rel. Keast v. District Court, — M —, 348 P 2d 135.

General Requisites for Issuance of Writ

The writ lies only when the person seeking it is entitled to have the defendant perform a clear legal duty, and then only when there is no speedy or adequate rem-

Mandamus Lies to Compel Highway Patrol and Officers to Return Motor Vehicle License Plates

An automobile co-owner had the right to a writ of mandamus to regain license plates taken from her automobile by the

highway patrol acting under the authority of section 53-422 following an accident of the other co-owner while driving another vehicle. *State v. State Highway Patrol*, 133 M 162, 321 P 2d 612, 614.

Mandamus Lies to Compel Issuance of License

Mandamus will lie to compel issuance of license for logging trailer under section 53-122. *State ex rel. Sharp v. Cross*, 123 M 261, 211 P 2d 760.

Operation and Effect

Mandamus is properly issued to carry into effect the judgment of the Supreme Court where the district court fails for any reason to execute its mandate from the Supreme Court. *State ex rel. Kitchens v. District Court*, 130 M 57, 294 P 2d 907, 911.

Where an employee of the state fish and game commission was summarily dismissed by the commission without sufficient notice, he was entitled to relief by way of mandamus; even though, subsequent to the discharge, he was given notice that a hearing on his dismissal would be held. *State v. State Fish & Game Comm.*, 133 M 362, 323 P 2d 1116, 1118.

In a mandamus proceeding to compel the department of public welfare to rescind a general order providing that members of a striking union were to receive less general relief assistance than other general relief recipients in the same class, the evidence showed that a judgment granting a peremptory writ of mandate was proper. *State ex rel. International*

Union of Mine, Mill & Smelter Workers v. Montana State Department of Public Welfare, — M —, 347 P 2d 727.

Where the board of administration of the retirement system had made a determination as to the incapacity of a claimant for retirement compensation but did not provide the hearing as contemplated by statute and required by due process, the relator in a mandamus proceeding is entitled to an order commanding the board to grant a hearing. *State ex rel. Morgan v. White*, — M —, 348 P 2d 991.

When Mandamus is Not Proper

Where the holder of a registered brand died and thereafter the brand expired without being re-registered, the brand was then open to record by anyone; hence, mandamus brought by the administrator of the deceased person at a later date would not lie to require the recorder of marks and brands to record the brand in the administrator's name as there is no clear legal duty upon the recorder to do what the administrator required by his complaint. *Benolken v. Miracle*, 129 M 495, 289 P 2d 953, 954.

Requiring successor judge to journalize finding or decision of predecessor. 4 ALR 2d 884.

Mandamus to protect charitable or eleemosynary corporation against use of same or similar name by another corporation. 27 ALR 2d 962.

Mandamus to compel municipal officials to enforce zoning regulations. 35 ALR 2d 1136.

93-9103. (9849) Writ—when and upon what to issue.

Contracts of Teachers

Where nonunion schoolteachers were offered a salary increase only if they signed a contract which contained a union security clause, they were entitled to bring a mandamus action against the school district to obtain a judgment declaring that they could not be discriminated against, compelling the district to enter into contracts with them, and ruling that the

union security provision was void. *Benson v. School Dist. No. 1 of Silver Bow County*, — M —, 344 P 2d 117.

What Applicant Must Establish

The applicant must establish a clear legal right to the writ in his application therefor, and a violation of duty by the person sought to be coerced. *Stewart v. State*, 135 M 323, 340 P 2d 151.

93-9104. (9850) Must be either alternative or peremptory—substance.

Operation and Effect

Where the liquor control board issued a license in compliance with district court mandate in lieu of applying for super-sedeas from Supreme Court, the question

whether the mandate was proper did not present a justiciable controversy for the Supreme Court, even under section 93-8024. *Gill v. Rafn*, 133 M 505, 326 P 2d 974, distinguished in 348 P 2d 799.

93-9106. (9852) The adverse party must answer under oath.

References

Cited or applied in *Esterby v. Justice Court of Hellgate Township*, 127 M 1,

256 P 2d 544, 546; *State ex rel. Adamson v. District Court*, 128 M 538, 279 P 2d 691, 692.

93-9107. (9853) If an essential question of fact is raised, etc.**References**Cited or applied in *Esterby v. Justice*

Court of Hellgate Township, 127 M 1, 256 P 2d 544, 546.

93-9111. (9857) If no answer be made, etc.**References**Cited or applied in *State ex rel. Helena**Housing Authority v. City Council of Helena*, 125 M 592, 242 P 2d 250, 256.**93-9112. (9858) Damages, costs and peremptory mandate allowed, etc.****Attorney Fees**

Attorney fees are damages within the meaning of the statute. *State ex rel. O'Sullivan v. District Court*, 127 M 32, 256 P 2d 1076, 1078.

Where counsel for relatrix made several trips to consult with a judge who had been disqualified about calling in another judge and then later instituted mandamus proceedings to compel the appointment of another judge, such expenses of travel is not a proper item of costs incident to the institution of the mandamus proceeding. It was a matter that should have been attended to by letter or telephone. *State ex rel. O'Sullivan v. District Court*, 127 M 32, 256 P 2d 1076, 1079.

Where relator for a writ of mandamus requiring the court to set a case for trial, and return was made, and alternate writ issued, and return and answer showed that the cause had been set for trial, the relator was entitled to recover from the county attorney fees upon the court's finding that the respondents appeared in the action and made defense in the proceeding in good faith. *State ex rel. Haegg v. District Court*, 130 M 530, 304 P 2d 1116, 1117.

If pleaded, attorney fees are allowable as an item of damages in prohibition cases. *State v. District Court*, 131 M 397, 310 P 2d 779, 782, 64 ALR 2d 1324.

Where a mandamus proceeding involved the validity of a corporation's bylaw abolishing cumulative voting and the matter was one of first impression and there were no existing precedents to guide the re-

spondents, and where the petitioner was a party to the effort to abolish cumulative voting in the first instance, the allowance of attorney fees to the petitioner should be conservative. *State ex rel. Lawin v. Polson Plywood Co.*, 135 M 559, 342 P 2d 1070.

In a mandamus and declaratory judgment action by schoolteachers against a school district, the judge, who had observed the extent of the services rendered by counsel for the plaintiffs, could properly award attorneys' fees to schoolteachers who had properly pleaded their right to such award. *Benson v. School Dist. No. 1 of Silver Bow County*, — M —, 344 P 2d 117.

Damages and Costs

Held that where the judge issued the order sought, one day after the relatrix instituted mandamus proceedings to compel the action, the relatrix could still recover reasonable attorneys' fees, costs and damages for instituting and prosecuting the mandamus proceedings. *State ex rel. O'Sullivan v. District Court*, 127 M 32, 256 P 2d 1076, 1079.

References

Cited or applied in *State ex rel. Miller v. District Court*, 130 M 65, 294 P 2d 903, 904; *State ex rel. James v. Aronson*, 132 M 120, 314 P 2d 849; *State ex rel. Willumsen v. City of Butte*, 135 M 350, 340 P 2d 535, 538.

93-9114. (9860) Penalty for disobedience to the writ.**References**

Cited in *Gill v. Rafn*, 133 M 505, 326 P 2d 974.

CHAPTER 92—PROHIBITION—WRIT OF**93-9201. (9861) Prohibition defined.****Cross-Reference**

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

Attorney Fees

If pleaded, attorney fees are allowable as an item of damages in prohibition cases.

State v. District Court, 131 M 397, 310 P 2d 779, 782, 64 ALR 2d 1324.

Habeas Corpus Proceeding

Where, during the course of a divorce proceeding a judge is disqualified and another judge assumes jurisdiction and com-

mits the husband to jail for contempt, on a habeas corpus petition brought by the jailed husband the disqualified judge would not be authorized to act and a writ of prohibition will lie to prohibit such judge from proceeding further in the habeas corpus matter. *State v. District Court of Lewis and Clark County*, 130 M 73, 295 P 2d 233.

Jurisdiction

The term "jurisdiction," as used in this section, means the power to hear and determine the particular case. *State ex rel. Yuhas v. Board of Medical Examiners*, 135 M 381, 339 P 2d 981.

Nature of Writ

If the district court and judge were proceeding within the jurisdiction given them by the Constitution and statutes of this state, they may not be restrained by this writ out of the Supreme Court. Moreover, even though the district court at some point exceeded its jurisdiction, the writ of prohibition must be denied if the person has another plain, speedy and adequate remedy in the ordinary course of law. *State ex rel. Adamson v. District Court*, 128 M 462, 279 P 2d 691, 693.

Prohibition does not properly issue as a writ of right, but only in the exercise of a sound judicial discretion to arrest the proceedings of courts, or tribunals or officers exercising judicial functions, but acting at the time without or in excess of its or their jurisdiction. *State ex rel. Adamson v. District Court*, 128 M 538, 279 P 2d 691, 693.

Operation and Effect

Writ of prohibition does not lie against the county superintendent of schools to prevent her from acting in an appeal taken to her by a teacher who had been denied re-employment by the school board since by section 75-2411 appeals from such dismissals go to the county superintendent of schools. *State ex rel. Saxtorph v. District Court*, 128 M 353, 275 P 2d 209.

District court acted in excess of its jurisdiction in summarily issuing an order affecting the right to custody of a child without giving notice and a hearing to the child's mother. *State v. District Court*, 131 M 397, 310 P 2d 779, 782, 64 ALR 2d 1324.

Where an order of the district court, issued without notice and without a hearing, was to deprive a mother of the custody of her child, and there were two modifications of the original custody decree which would require separate appeals, an appeal would not be adequate to protect the best interests of the child, and

a writ of prohibition was the proper remedy. *State v. District Court*, 131 M 397, 310 P 2d 779, 781, 64 ALR 2d 1324.

When Writ Does Not Lie

The writ of prohibition will not be issued as of course or because it may be the most convenient remedy, nor will it be allowed to take the place of an appeal, or perform the offices of a writ of review. *State ex rel. Lee v. Montana Livestock Sanitary Board*, 135 M 202, 339 P 2d 487.

The writ of prohibition will not restrain a ministerial, executive or administrative function, no matter how illegal the act thereunder may be, so long as the tribunal sought to be restrained has jurisdiction of the subject matter in controversy; a mistaken exercise of such tribunal's acknowledged powers will not justify the issuance of the writ. *State ex rel. Lee v. Montana Livestock Sanitary Board*, 135 M 202, 339 P 2d 487.

The provision of this section purporting to authorize the issuance of a writ of prohibition to arrest the ministerial functions of an administrative body is invalid as applied to an order of inspection of cattle by the state livestock sanitary board pursuant to section 46-212, such power being outside the scope of the writ as known at the time Section 11, Article VIII of the state Constitution was adopted. *State ex rel. Lee v. Montana Livestock Sanitary Board*, 135 M 202, 339 P 2d 487.

When Writ May Be Granted

Refusal of court to set aside indictments on grounds set forth in section 94-6601 may be reviewed on writ of prohibition under the authority granted the Supreme Court by Const., Art. VIII, sec. 2 giving it superintending control over the courts. *State ex rel. Porter v. District Court*, 124 M 249, 220 P 2d 1035, 1039, distinguished in 309 P 2d 320.

Supreme Court had jurisdiction to grant writ of prohibition to prevent payment of grand jury illegally in session. *State ex rel. Adami v. Lewis and Clark County*, 124 M 282, 220 P 2d 1052.

The writ of prohibition lies when there is no other plain, speedy and adequate remedy at law. *State v. District Court*, 131 M 397, 310 P 2d 779, 780, 64 ALR 2d 1324.

Writ May Run to End Litigation and Save Expense

The writ of prohibition may be issued to end litigation and save expense. *State ex rel. Adami v. Lewis and Clark County*, 124 M 282, 220 P 2d 1052, 1054.

References

Cited or applied in *State ex rel. Reid*

v. District Court, 126 M 489, 255 P 2d 693, 704; State ex rel. Montana State

University v. District Court, 132 M 262, 317 P 2d 309, 313.

93-9202. (19862) Where and when issued.

Operation and Effect

Where Supreme Court issued an alternate writ of prohibition against a district court judge, and before the return date the district judge conceded that he was disqualified and would take no further part in the case in the district court, the alternate writ will be dissolved as there is no purpose for it. State ex rel. Miller v. District Court, 130 M 65, 294 P 2d 903. (Dissenting opinion, 130 M 65, 294 P 2d 903, 904.)

References

Cited or applied in State ex rel. Saxtorph v. District Court, 128 M 353, 275 P 2d 209, 213; State v. District Court of Lewis and Clark County, 130 M 73, 295 P 2d 233, 237; State v. District Court, 131 M 397, 310 P 2d 779, 780, 64 ALR 2d 1324; State ex rel. Aho v. Justice Court of Laurel Township, 131 M 585, 313 P 2d 542; State ex rel. Montana State University v. District Court, 132 M 262, 317 P 2d 309, 313.

93-9204. (19864) Certain provisions of the preceding chapter applicable.

Operation and Effect

This section adopts for writs of prohibition most of the statutes governing the practice applicable to writs of mandamus. Esterby v. Justice Court of Hellgate Township, 127 M 1, 256 P 2d 544, 546.

Pleading of Damages and Attorney Fees

The first condition to the recovery of damages and attorney fees is that they be claimed in the pleading. If they are not claimed in the pleading they are waived.

State ex rel. Miller v. District Court, 130 M 65, 294 P 2d 903, 904.

If pleaded, attorney fees are allowable as an item of damages in prohibition cases. State v. District Court, 131 M 397, 310 P 2d 779, 782, 64 ALR 2d 1324.

References

Cited or applied in State ex rel. Adamson v. District Court, 128 M 538, 279 P 2d 691, 692.

CHAPTER 93—ISSUANCE OF WRITS—RULES OF PRACTICE AND APPEALS

93-9301. (19865) Writs of review, mandate and prohibition, etc.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

CHAPTER 94—CONFESSION OF JUDGMENT WITHOUT ACTION

93-9401. (19868) Judgment may be confessed for debt due, etc.

Res judicata as affected by fact that former judgment was entered by agreement or consent. 2 ALR 2d 514.

What law governs validity of warrant or power of attorney to confess judgment. 19 ALR 2d 544.

CHAPTER 97—FORCIBLE ENTRY AND UNLAWFUL DETAINER—ACTIONS FOR

93-9701. (19887) Forcible entry defined.

Operation in General

Where the right to possession of real property is in dispute, the owners thereof may not take the law into their own hands and proceed by violence to take possession thereof. In order to secure such possession, resort must be had to the

peaceful process of law. Brown v. Grenz, 127 M 49, 257 P 2d 246, 248.

Forcible entry and detainer as a remedy of tenant against stranger wrongfully interfering with his possession. 12 ALR 2d 1199.

93-9703. (19889) Unlawful detainer defined.

Action after Giving Notice

Where owner, after giving notice under

this section, commenced a course of action and conduct which forced the tenant from

the premises, instead of filing a complaint as provided by section 93-9708, he was liable for wrongful eviction. *Brown v. Grenz*, 127 M 49, 257 P 2d 246.

Agricultural Lands

The term "agricultural lands" as used in this section is to distinguish it from mining or urban property and it includes land used for grazing purposes. *Hamilton v. Rock*, 121 M 245, 191 P 2d 663, 666.

Change in Use of Building

Change in the use of a building by sublessee from a retail food store to a motor

sales and garage did not amount to waste or destruction of building. *Turman v. Safeway Stores, Inc.*, 132 M 273, 317 P 2d 302, 304, 307.

Notice to Quit

Whether notice that deal with regard to the sale of land was off and that if there was any further desire to buy or lease land they should see the party appointed to act as agent for the owner was a notice to quit, was a question for the jury. *Hamilton v. Rock*, 121 M 245, 191 P 2d 663, 666.

93-9705. (1981) What courts have jurisdiction.

References

Cited or applied in *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 999.

93-9706. (1982) Parties defendant.

Operation and Effect

Nothing in this section denies to any defendant in any action brought under this chapter the permissive right accorded by section 93-3415 to any defendant to file a cross-complaint, and therefore, un-

der section 93-9707 which incorporates provisions of sections 93-2301 to 93-8718 relating to parties, the provisions of section 93-3415 are applicable. *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 998.

93-9707. (1983) Parties generally.

Operation and Effect

This section and section 93-9718 specifically make certain designated sections of the Code of Civil Procedure, which includes 93-3415, applicable to proceedings

for forcible entry and unlawful detainer and authorize a defendant therein to file a cross-complaint. *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 995, 998.

93-9708. (1984) Complaint—judge to fix day for appearance, etc.

References

Cited in *State ex rel. Sullivan v. District Court*, 122 M 1, 196 P 2d 452, 453;

Hutchinson v. Burton, 126 M 279, 247 P 2d 987, 997; *Brown v. Grenz*, 127 M 49, 257 P 2d 246.

93-9711. (1987) Defendant may appear, etc.

References

Cited or applied in *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 997.

93-9714. (1990) Complaint must be amended in certain cases.

References

Cited or applied in *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 997.

93-9716. (1992) Verification of complaint and answer.

References

Cited or applied in *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 995, 997, 998.

93-9718. (1994) Rules of practice.

Operation and Effect

This section and section 93-9707 specifically make certain designated sections of the Code of Civil Procedure, which includes 93-3415, applicable to proceedings

for forcible entry and unlawful detainer and authorize a defendant therein to file a cross-complaint. *Hutchinson v. Burton*, 126 M 279, 247 P 2d 987, 995, 997, 998.

93-9720. (9906) Relief against forfeiture of lease.

References

Cited or applied in *Davis v. Burton*, 128 M 434, 278 P 2d 213, 218.

CHAPTER 98—CONTEMPTS

93-9801. (9908) What acts or omissions are contempts.

References

Cited in *Gill v. Rafn*, 133 M 505, 326 P 2d 974.

Enforcement of contract by party to procure insurance on his own life by contempt proceedings. 12 ALR 2d 983.

Right to punish for contempt for failure to obey court order or decree either beyond power or jurisdiction of court or merely erroneous. 12 ALR 2d 1059.

Punishment of civil contempt in other than divorce cases by striking, pleading or entering default judgment for dismissal against contemner. 14 ALR 2d 580.

Procuring perjury as contempt. 29 ALR 2d 1157.

Bail jumping after conviction, failure to surrender or to appear for sentencing and the like, as contempt. 34 ALR 2d 1100.

93-9803. (9910) A contempt committed in the presence of the court, etc.

Contemptuous Pleading

The filing of a complaint in a civil action containing immaterial and irrelevant allegations of scandalous and defamatory matter concerning the lives and characters of the members of the grand jury constituted contempt. *State ex rel. Porter v. First Judicial Dist.*, 123 M 447, 215 P 2d 279.

Where contempt was based on scandalous and defamatory allegations in pleading, which allegations were immaterial and irrelevant, the truth or falsity of the allegations is immaterial. *State ex rel. Porter v. First Judicial Dist.*, 123 M 447, 215 P 2d 279.

Sufficiency of Affidavit Charging Contempt

County attorney's accusatory affidavit

was not insufficient because made on information and belief. *State ex rel. Porter v. First Judicial Dist.*, 123 M 447, 215 P 2d 279.

County attorney's accusatory affidavit specifically charging that the accused filed a complaint containing false, malicious, untrue, libelous, defamatory and contemptuous matter concerning members of the grand jury and its prosecutor and that such a filing constituted contempt was sufficient. *State ex rel. Porter v. First Judicial Dist.*, 123 M 447, 215 P 2d 279.

Privilege against self incrimination as to testimony before grand jury as affecting contempt proceedings. 38 ALR 2d 239.

93-9809. (9916) Hearing.

Proof

In action for contempt for failure to pay alimony pendente lite it is not necessary for the wife to show the husband's ability to pay, but lack of ability to perform is a defense to be advanced and to be proved by the accused. *State ex rel. Houtchens v. District Court*, 122 M 76, 199 P 2d 272, 274.

Where orders of court ordering payment of alimony pendente lite and support money and finding of ability to pay were not appealed, and there was substantial evidence in the record tending to establish ability to pay, court had jurisdiction to sentence for contempt. *State ex rel. Houtchens v. District Court*, 122 M 76, 199 P 2d 272, 274.

93-9810. (9917) Judgment and penalty, if guilty.

Fine Enforced by Imprisonment

It is well settled in this jurisdiction that the payment of a fine imposed upon one adjudged guilty of contempt may be enforced by imprisonment and that imprisonment in excess of five days is permissible to compel such payment. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 767.

Purge Order

A purge order contained in a judgment for contempt is not coercive and beyond the jurisdiction of the court, they being for the defendant's benefit. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 768.

Suspension of Execution

Contempt order containing provision for

the suspension of execution if monthly payments are made "each month after the present month, the execution of the judgment will continue to be suspended, and this for the period of one year; and if the payments have been continued for twelve of such calendar months then the

execution of such judgment will be continued indefinitely," was not a judgment for an indefinite period of time but twelve months was fixed as the maximum of the coercive effect. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 769.

93-9811. (9918) If the contempt is the omission, etc.

Alimony—Failure to Pay

A person may be sentenced for contempt under this section for failure to pay alimony pendente lite although he has no money and no income, where it is shown that the defendant has the ability to obtain such funds by his labor. *State ex rel. Houtchens v. District Court*, 122 M 76, 199 P 2d 272, 275.

Imprisonment

A person who refuses to perform a judicial order which he is able to perform may be imprisoned until he complies with such order. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 768.

93-9814. (9921) Judgment and orders in such cases final.

Operation and Effect

The writ of certiorari is discretionary and is only granted when there has been a showing that tribunal making the judg-

ment of contempt acted in excess of jurisdiction. *State ex rel. Porter v. First Judicial Dist.*, 123 M 447, 215 P 2d 279.

CHAPTER 99—EMINENT DOMAIN

Section 93-9902. What are public uses.

93-9903. What estates in lands may be acquired by condemnation.

93-9903.1. Appropriation of underground natural gas reservoir—effect on landowner's right to drill.

93-9908. The complaint and its contents.

93-9909. Summons, what to contain—how issued and served.

93-9910. Who may defend—answer of defendant.

93-9911. Power of court—preliminary condemnation order.

93-9912. Appointment and meeting of commissioners.

93-9913. The date with respect to which compensation shall be assessed.

93-9914. Report of commissioners.

93-9915. Appeal from assessment of commissioners.

93-9920. Putting plaintiff in possession.

93-9901. (9933) Eminent domain defined.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

References

Cited in *State v. Peterson*, 134 M 52, 328 P 2d 617, 627.

93-9902. (9934) What are public uses. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the government of the United States.
2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislative assembly of the state.
3. Public buildings and grounds for the use of any county, city, or town, or school districts; canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of any county, city, or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; roads, streets, and alleys, and all other public uses for the benefit of any county, city, or town, or the inhabitants thereof, which may be authorized by the legis-

lative assembly; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes or ordinances by which the same may be authorized.

4. Wharves, docks, piers, chutes, booms, ferries, bridges, of all kinds, private roads, plank and turnpike roads, railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines, mills, and smelters for the reduction of ores and farming neighborhoods with water, and drainage and reclaiming lands, and for floating logs and lumber on streams not navigable, and sites for reservoirs, necessary for collecting and storing water.

5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, mills, or smelters for the reduction of ores; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines, mills and smelters for the reduction of ores, also an occupancy in common by the owners or the possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters for reduction of ores, and sites for reservoirs necessary for collecting and storing water.

6. Private roads leading from highways to residences or farms.

7. Telephone or electric light lines.

8. Telegraph lines.

9. Sewerage of any city, county, or town, or any subdivision thereof, whether incorporated or unincorporated, or of any settlement consisting of not less than ten (10) families, or of any public buildings belonging to the state, or to any college or university.

10. Tramway lines.

11. Electric power lines.

12. Logging railways.

13. Temporary logging roads and banking grounds for the transportation of logs and timber products to public streams, lakes, mills, railroads, or highways, for such time as the court or judge may determine; provided, the grounds of state institutions be excepted.

14. Underground reservoirs suitable for storage of natural gas.

15. To mine and extract ores, metals or minerals owned by the plaintiff located beneath or upon the surface of property where the title to said surface vests in others.

History: En. Sec. 580, p. 189, L. 1877; re-en. Sec. 580, 1st Div. Rev. Stat. 1879; re-en. Sec. 598, 1st Div. Comp. Stat. 1887; amd. Sec. 2211, C. Civ. Proc. 1895; amd. Sec. 1, p. 135, L. 1899; amd. Sec. 1, Ch. 4, L. 1907; Sec. 7331, Rev. C. 1907; re-en. Sec. 9934, R. C. M. 1921; amd. Sec. 1, Ch. 245, L. 1953; amd. Sec. 6, Ch. 259, L. 1955; amd. Sec. 1, Ch. 216, L. 1961. Cal. C. Civ. Proc. Sec. 1238.

Compiler's Note

Sections 1 to 5 of Ch. 259, Laws 1955 are compiled as secs. 60-801 to 60-805.

Amendments

The 1953 amendment added subsection 14.

The 1955 amendment substituted present subd. 14 for one that read "Underground barren reservoirs suitable for storage of natural gas, except that this subsection 14 shall only apply to a sand stratum or formation known to be suitable for use as an underground gas storage reservoir."

The 1961 amendment added subd. 15.

References

Cited or applied in *Tomten v. Thomas*, 125 M 159, 232 P 2d 723, 724, 725, 26 ALR 2d 1285; *Simonson v. McDonald*, 131 M 494, 311 P 2d 982, 984.

Damage to private property caused by negligence of governmental agents as "taking," "damage" or "use" for public purposes in constitutional sense. 2 ALR 2d 707.

Off-street public parking facilities. 8 ALR 2d 394.

Constitutionality of reforestation or

forest conservation legislation. 13 ALR 2d 1095.

Condemnation of another railroad's property for purposes of spur track and the like. 35 ALR 2d 1340.

Condemnor's acquisition of, or right to, minerals under land in eminent domain for highway purposes. 36 ALR 2d 1425.

Compulsory polling or unitization statute or ordinance requiring owners or lessees of oil and gas lands to develop their holdings as a single drilling unit and the like, as taking private property for private use. 37 ALR 2d 439.

93-9903. (1935) What estates in lands may be acquired by condemnation. The following is a classification of the estates and rights in lands subject to be taken for the public use:

1. Such estate or rights as may be necessary up to and including a fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs or dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, or for the mining and extracting of ores, metals, or minerals when the same are owned by the plaintiff but located beneath or upon the surface of property where the title to said surface vests in others, or for the underground storage of natural gas by a natural gas public utility as defined in this act. When the appropriation is for the underground storage of natural gas, all of the right, title, interest and estate in the real property and in the subsand stratum, formation or reservoir so appropriated shall be determinable and for all purposes terminate upon abandonment or upon cessation for the period of one year of the use for which the same was appropriated and thereupon, the ownership of the residue of natural gas therein remaining shall likewise vest in the then owners of such reservoir space.

2. An easement, when taken for any other use.

3. The right of entry upon and occupation of land, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

History: En. Sec. 581, p. 190, L. 1877; re-en. Sec. 581, 1st Div. Rev. Stat. 1879; re-en. Sec. 599, 1st Div. Comp. Stat. 1887; re-en. Sec. 2212, C. Civ. Proc. 1895; re-en. Sec. 7332, Rev. C. 1907; re-en. Sec. 9935, R. C. M. 1921; amd. Sec. 1, Ch. 158, L. 1943; amd. Sec. 2, Ch. 245, L. 1953; amd. Sec. 7, Ch. 259, L. 1955; amd. Sec. 2, Ch. 216, L. 1961. Cal. C. Civ. Proc. Sec. 1239.

The 1955 amendment deleted what was added by the 1953 amendment and added that part of subd. 1 beginning with the words "or for the underground storage * * *."

The 1961 amendment inserted the words "or for the mining and extracting of ores, metals, or minerals when the same are owned by the plaintiff but located beneath or upon the surface of property where the title to said surface vests in others" in the first sentence of subd. 1.

Compiler's Note

Sections 3 and 4 of Ch. 245, Laws 1953 are compiled as secs. 93-9908, 93-9911.

Separability Clause

Amendments

The 1953 amendment in subsection 1 inserted the words "other than underground reservoirs provided for in subsection 14 of section 1 of this act."

Section 3 of Ch. 216, Laws 1961 read "Constitutionality. If any part or parts of this act shall be held unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this

act. The legislature hereby declares that it would have passed the remaining parts of this act if it had known that such part or parts thereof would be declared unconstitutional."

93-9903.1. Appropriation of underground natural gas reservoir—effect on landowner's right to drill. The appropriation of any sand, stratum or formation for use as an underground natural gas storage reservoir shall be without prejudice to the rights of the owner or owners of said lands, or of the oil, gas or other mineral rights therein, to drill or bore through the sand, stratum or formation so appropriated for use as an underground natural gas storage reservoir, in order to explore for, produce, process, treat or market any oil, gas or other minerals that might be contained in said lands above or below the sands, stratum or formation so appropriated. Any additional cost or expense required to be incurred in order to protect the underground gas storage reservoir against pollution and the escape of the gas therefrom, by reason of such boring or drilling through of the sand, stratum or formation used as such underground gas storage reservoir shall be paid by the persons, firm or corporation then owning such underground gas storage reservoir.

History: En. Sec. 5, Ch. 245, Laws 1953.

Separability Clause

Section 6 of Ch. 245, Laws 1953 read: "If any part or parts of this act shall be held to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this act. The legislature hereby declares that it would have passed the remaining parts of this act if it had known that such part or

Repealing Clause

Section 4 of Ch. 216, Laws 1961 repealed all acts and parts of acts in conflict therewith.

parts thereof would be declared unconstitutional."

Repealing Clause

Section 7 of Ch. 245, Laws 1953 repealed all acts and parts of acts in conflict therewith.

Condemnor's acquisition of, or right to, minerals under land taken in eminent domain. 36 ALR 2d 1424.

93-9904. (9936) Private property defined—classes enumerated.

Subd. 4

Highways

Under section 32-1615 the state highway commission is the only tribunal authorized to condemn land for relocating highways, and even assuming that the taking of an existing highway is justified by this section as a more necessary public use where the purpose is to build a dam and a reservoir; yet the public

utility building the dam cannot acquire land for relocating the highway since that function is exclusively within the power of the highway commission. *State ex rel. Bartholomew v. District Court*, 126 M 183, 248 P 2d 215, 216.

References

Cited or applied in *Tomten v. Thomas*, 125 M 159, 232 P 2d 723, 724, 26 ALR 2d 1285.

93-9905. (9937) Facts necessary to be found before condemnation.

Appeals from Findings of Fact and Conclusions of Law

Since this section allows appeals from any finding or judgment made or rendered under this chapter, as in other cases and section 93-8003 allows appeals from final judgments or orders, an appeal does not lie from the court's finding of fact or conclusions of law. *Sheridan County Elec-*

tric Co-op. v. Anhalt, 127 M 71, 257 P 2d 889. (See, however, dissenting opinion, 127 M 71, 257 P 2d 889, 894.)

References

Cited or applied in *Tomten v. Thomas*, 125 M 159, 232 P 2d 723, 724, 26 ALR 2d 1285.

93-9908. (9940) The complaint and its contents. The complaint must contain:

1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff.

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

3. A statement of the right of plaintiff.

4. If a right-of-way is sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding.

5. A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of the entire parcel or tract. All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties. When application for the condemnation of a right-of-way for the purposes of sewerage is made on behalf of a settlement, or town, or a county, the county commissioners of the county may be named as plaintiff.

6. If a sand, stratum or formation suitable for use as an underground natural gas storage reservoir is sought to be appropriated, a description thereof and of the land in which it is alleged to be contained, and a description of all other property and rights sought to be appropriated for use in connection with the appropriation of the right to store natural gas in and withdraw natural gas from such reservoir. In addition, the complaint shall state facts showing that the underground reservoir is one subject to appropriation by plaintiff; also stating that the underground storage of natural gas in the land sought to be appropriated is in the public interest; that the underground reservoir is suitable and practicable for natural gas storage; that the plaintiff in good faith has been unable to acquire the rights sought to be appropriated hereunder and a statement that the rights and property sought to be appropriated are not prohibited by law; and in addition, the complaint must be accompanied by a certificate from the state oil and gas conservation commission as set forth in section 4 [93-804] of this act.

History: En. Sec. 586, p. 192, L. 1877; re-en. Sec. 586, 1st Div. Rev. Stat. 1879; re-en. Sec. 604, 1st Div. Comp. Stat. 1887; amd. Sec. 2217, C. Civ. Proc. 1895; re-en. Sec. 7337, Rev. C. 1907; re-en. Sec. 9940, R. C. M. 1921; amd. Sec. 3, Ch. 245, L. 1953; amd. Sec. 8, Ch. 259, L. 1955. Cal. C. Civ. Proc. Sec. 1244.

The 1955 amendment near the beginning of subd. 6 deleted the words "known to be" which appeared between the words "formation" and "suitable" and at the end of subd. 6 substituted "as set forth in section 4 of this act" for "setting forth its findings as to the existence of all of the facts contained in this paragraph."

Amendments

The 1953 amendment substituted "is" for "be" at the beginning of subdivision 4; and added subdivision 6.

Propriety of pleading of promissory statements of condemner as to character and use or undertakings to be performed by it. 7 ALR 2d 381.

93-9909. (9941) Summons, what to contain—how issued and served. The clerk must issue a summons, which must contain the names of the parties, a description of the lands and other property proposed to be taken, a statement of the public use for which it is sought, and a notice to the

defendants to file and serve upon the plaintiff an answer within fifteen (15) days from date of service of summons and to appear before the court or judge, at a time and place therein specified, and show cause why the property described should not be condemned as prayed for in the complaint. Such summons must, in other particulars, be in form of a summons in a civil action, and must be served in like manner upon each defendant named therein, at least twenty (20) days previous to the time designated in such notice for the hearing. A copy of the complaint must be served, with the summons, upon each defendant named. But the failure to make such service upon a defendant does not affect the right to proceed against any or all other of the defendants, upon whom service of summons had been made.

History: En. Sec. 587, p. 192, L. 1877; re-en. Sec. 587, 1st Div. Rev. Stat. 1879; amd. Sec. 605, 1st Div. Comp. Stat. 1887; amd. Sec. 2218, C. Civ. Proc. 1895; re-en. Sec. 7338, Rev. C. 1907; re-en. Sec. 9941, R. C. M. 1921; amd. Sec. 9, Ch. 259, L. 1955; amd. Sec. 1, Ch. 234, L. 1961. Cal. C. Civ. Proc. Sec. 1245.

Amendments

The 1955 amendment inserted the words "and other property" in this section.

The 1961 amendment inserted the words "to file and serve upon the plaintiff an answer within fifteen (15) days from date of service of summons and" after "notice to the defendants" in the first sentence; changed the time specified in the second sentence for service of summons from ten to twenty days before hearing; and substituted the present third sentence for a clause which appeared at the end of the second sentence and read, "and no copy of the complaint need be served."

93-9910. (9942) Who may defend—answer of defendant. All persons named in the complaint, in occupation of, or claiming an interest in, any of the property described in the complaint, or in the amount to be awarded for the taking thereof, though not named, may appear. The answer of each appearing defendant must be filed and served upon the plaintiff, or upon any attorney for plaintiff, within a period of fifteen (15) days after the service of summons and complaint. The answer of each appearing defendant must contain a specific allegation as to the total amount which such defendant claims is reasonable and just for the taking of such defendant's lands or other real property or interest therein.

History: En. Sec. 588, p. 192, L. 1877; re-en. Sec. 588, 1st Div. Rev. Stat. 1879; re-en. Sec. 606, 1st Div. Comp. Stat. 1887; amd. Sec. 2219, C. Civ. Proc. 1895; re-en. Sec. 7339, Rev. C. 1907; re-en. Sec. 9942, R. C. M. 1921; amd. Sec. 2, Ch. 234, L. 1961. Cal. C. Civ. Proc. Sec. 1246.

Amendment

The 1961 amendment substituted "amount to be awarded" for "damages" in the latter part of the first sentence; deleted from the end of the first sentence the words "answer, or demur, each in respect to his own property or interest"; and added the second and third sentences.

93-9911. (9943) Power of court—preliminary condemnation order. The court or judge has power:

1. To regulate and determine the place and manner of making the connections and crossings, and enjoying the common uses mentioned in subdivision 5, section 93-9904, and of the occupying of canyons, passes, and defiles for railroad purposes, as permitted and regulated by the laws of this state or of the United States;

2. To determine whether or not the use for which the property is sought to be appropriated is a public use, within the meaning of the laws of this state;

3. To limit the amount of property sought to be appropriated, if in the opinion of the court or judge the quantity sought to be appropriated is not necessary;

4. If the court or judge is satisfied, from the evidence presented at the hearing provided for in section 93-9909, that the public interests require the taking of such lands, and that the facts necessary to be found before condemnation appear, it or he must forthwith make and enter a preliminary condemnation order that the condemnation of the land or other real property may proceed in accordance with the provisions of this chapter.

5. If the property sought to be appropriated is a sand, stratum or formation suitable for use as an underground natural gas storage reservoir and the existence and suitability of it for such use has been proved by plaintiff upon substantial evidence, the order of the court or judge shall direct the commissioners so appointed to ascertain and determine the amount to be paid by the plaintiff to each person for his interest in the property sought to be appropriated for use as such underground natural gas storage reservoir, and/or as the annual rental for the use of such underground gas storage reservoir and for the use of so much of the surface as is required in the operation of the said underground gas storage reservoir, and for the use in connection with the creation, operation and maintenance thereof, and for all the native gas contained in said reservoir as compensation and damages by reason of the appropriation of such property; provided, however, the amount to be paid for such native gas and all thereof shall be no less than the market value of such gas.

The court shall appoint three (3) persons, qualified as experts and recommended as such by the oil and gas conservation commission of the state of Montana, to assist and advise the commissioners in determining the compensation and damages to be paid by plaintiff to each person for his interest in the property sought to be appropriated and the fees and expenses of such persons shall be chargeable as costs of the proceedings to be paid by the plaintiff.

History: Ap. p. Sec. 589, p. 193, L. 1877; re-en. Sec. 589, 1st Div. Rev. Stat. 1879; re-en. Sec. 607, 1st Div. Comp. Stat. 1887; amd. Sec. 2220, C. Civ. Proc. 1895; re-en. Sec. 7340, Rev. C. 1907; re-en. Sec. 9943, R. C. M. 1921; amd. Sec. 4, Ch. 245, L. 1953; amd. Sec. 10, Ch. 259, L. 1955; amd. Sec. 3, Ch. 234, L. 1961. Cal. C. Civ. Proc. Sec. 1247.

Compiler's Note

Section 5 of Ch. 245, Laws 1953 is compiled as sec. 93-9903-1.

Amendments

The 1953 amendment added subdivision 5.

The 1955 amendment in the first paragraph of subd. 5, substituted "each person for his interest" for "each owner or other person interested"; inserted the words "and/or as the annual rental for the use of such underground gas storage

reservoir and for the use of so much of the surface as is required in the operation of the said underground gas storage reservoir"; inserted the words "and for all the native gas contained in said reservoir"; added the proviso in that paragraph and in the second paragraph of subd. 5 substituted "each person for his interest" for "each owner, or other person interested."

The 1961 amendment inserted the phrases "from the evidence presented at the hearing provided for in section 93-9909" and "and that the facts necessary to be found before condemnation appear" in subd. 4; and substituted the latter part of subd. 4, beginning with the words "forthwith make and enter," for the following: "make an order appointing three (3) competent persons, resident in said county, commissioners to ascertain and determine the amount to be paid by the plaintiff to each owner,

or other person interested in such property, as damages, by reason of the appropriation of such property, and specify the time and place of the first meeting of such commissioners, and fixing their compensation. Any party may object to the appointment of any person as a commissioner on the same grounds that he might object to him as a trial juror."

Separability Clause

Section 11 of Ch. 259, Laws 1955 read "Constitutionality. If any part or parts

of this act shall be held to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this act. The legislature hereby declares that it would have passed the remaining parts of this act if it had known that such part or parts thereof would be declared unconstitutional."

Repealing Clause

Section 12 of Ch. 259, Laws 1955 repealed all acts and parts of acts in conflict therewith.

93-9912. (9944) Appointment and meeting of commissioners. Immediately upon making and entering the preliminary condemnation order the judge must meet with the respective parties, or their attorneys of record, for the purpose of appointing condemnation commissioners to ascertain and determine the amount to be paid by the plaintiff to each owner or other persons interested in such property by reason of the appropriation of such property. The court must thereupon appoint three (3) qualified, disinterested condemnation commissioners. One of such commissioners shall be nominated by the party or parties plaintiff; one of such commissioners shall be nominated by the party or parties defendant. The third commissioner shall be the chairman and shall be nominated by the two commissioners previously nominated, provided, however, that if said two commissioners fail to make such choice at the time of their appointment, then such nomination shall be made by the presiding judge. Each commissioner shall possess the following qualifications: a citizen of the United States and over twenty-one (21) years of age; that he is not more than seventy (70) years of age; that he is in possession of natural faculties, of ordinary intelligence and not decrepit; that he is possessed of sufficient knowledge of the English language; that he was assessed on the last assessment roll of a county within the judicial district in which the action is pending; that he has not been convicted of malfeasance in office, or any felony or other high crime; that he is not related within the sixth degree to any party; that he does not stand in the relation of guardian and ward, master and servant, debtor and creditor, or principal and agent, or partner or surety as to any party. At the time of such meeting and nominations there shall be filed with the court by each nominating party or judge an affidavit of the person so nominated stating substantially as follows: that he has formed no unqualified opinion or belief as to the compensation to be awarded in the proceeding or as to the fairness or unfairness of the plaintiff's offer for the lands and improvements of the defendants; and that he has no enmity against or bias in favor of any party and has not discussed, communicated or overheard or read any discussion or communication from any party relating to values of the lands in question or the compensation offered, demanded or to be awarded; that if selected as a condemnation commissioner he is willing to serve and will well and truly try the issues of compensation and a true decision render according to the evidence and in compliance with the instructions of the court; that he will not discuss the case with anyone except the other commissioners until a decision has been filed with the court.

Immediately upon such nomination and appointment of commissioners the same shall proceed to meet at the time and place stated in the order appointing them, which time shall be not more than ten (10) days after the order of appointing, and proceed to examine the lands sought to be appropriated. At a time appointed by the judge and within said (10) day period they shall hear the allegations and evidence of all persons interested in each of the several parcels of land. Such hearing shall be attended by, and presided over by, the presiding judge who shall make all necessary rulings upon procedure and the admissibility of evidence. At the conclusion of the aforesaid hearing, the court or judge shall instruct the commissioners as to the law applicable to their deliberations and shall instruct them that their duty is to determine, solely upon the basis of said examination of lands, the evidence produced at the hearing or hearings and the instructions of the court, the following:

1. The value of the property sought to be appropriated, and all improvements thereon pertaining to the realty, and of each and every separate estate and interest therein; if it consist of different parcels, the value of each parcel and each estate or interest therein must be separately assessed.

2. If the property sought to be appropriated constitutes only a part of a larger parcel, the depreciation in value which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff.

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvements proposed by the plaintiff, and if the benefit shall be equal to the amount assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefits shall be less than the amount assessed under subdivision 2, the former shall be deducted from the latter, and the remainder shall be the only amount allowed in addition to the value.

4. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle-guards where fences may cross the line of such railroad.

5. Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award, for said property first determined, as hereinbefore stated, as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of each of such defendants in and to the award shall be determined by the commissioners, under supervision and instruction of the court, and the award apportioned accordingly.

History: En. Sec. 608, 1st Div. Comp. Stat. 1887; amd. Sec. 1, p. 269, L. 1891; amd. Sec. 2221, C. Civ. Proc. 1895; re-en. Sec. 7341, Rev. C. 1907; re-en. Sec. 9944, R. C. M. 1921; amd. Sec. 4, Ch. 234, L. 1961. Cal. C. Civ. Proc. Sec. 1248.

Amendment

The 1961 amendment inserted the first paragraph; completely revised the paragraph immediately preceding the numbered subdivisions (for previous text, see parent volume); substituted "depreciation

in value" for "damages" in subd. 2; substituted "amount assessed" for "damage assessed" in the first portion of subd. 3; substituted "amount assessed under subdivision 2" and "amount allowed" for "damage assessed" and "damages allowed" in the lat-

ter portion of subd. 3; and substituted subd. 5 for a subdivision reading, "5. As far as practicable, compensation must be assessed for each source of damage separately."

DECISIONS UNDER FORMER LAW

Commissioner's Assessment Not a Judgment

A commissioner's assessment is not a judgment, but merely an award by the lay commissioners of damages contained in their report, and, where an appeal has been perfected by the condemnor from the assessment, the condemnor is entitled to have a necessary party added as a party defendant. *State ex rel. State Highway Comm. v. District Court*, — M —, 348 P 2d 132.

Just Compensation

In eminent domain proceedings, the jury findings will generally not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to be in excess of just compensation provided for by section 14, article III, of the Montana Constitution. *State v. Peterson*, 134 M 52, 328 P 2d 617, 620.

Removal of Fixtures

In proceedings to condemn tract of land for new highway which would leave de-

fendant's business on old highway, testimony concerning removal of gas tanks was wholly incompetent. Landowner was not required to remove his buildings or fixtures from the land taken and accept an amount of money to defray costs of removal. *State v. Peterson*, 134 M 52, 328 P 2d 617, 624.

Valuation of Property

Testimony of right-of-way agents who had been engaged in the process of appraising real estate for some time all over the state, and had extensive experience in and knowledge of real estate values in community and elsewhere, should have been admitted by court to establish value of property taken by plaintiff for new highway. *State v. Peterson*, 134 M 52, 328 P 2d 617, 623.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes. 16 ALR 2d 1113.

93-9913. (1945) The date with respect to which compensation shall be assessed. For the purpose of assessing compensation the right thereto shall be deemed to have accrued at the date of the service of the summons, and its actual value as of that date shall be the measure of compensation for all property to be actually taken, and the basis of depreciation in value of property not actually taken, but injuriously affected. If an order be made letting the plaintiff into possession, as provided in section 93-9920, the amount awarded shall draw lawful interest from the date on which the property owner surrenders possession of the property in accordance with the terms of such order to the date of receipt of the award or any portion thereof; provided, however, that interest shall not be allowed or paid on so much thereof as shall have been paid to the landowner involved or withdrawn by such landowner from the court. No improvements put upon the property, subsequent to the date of the service of summons, shall be included in the assessment of compensation or depreciation in value, nor shall the same be used as the basis of computing such compensation or depreciation.

History: En. Sec. 591, p. 194, L. 1877; re-en. Sec. 591, 1st Div. Rev. Stat. 1879; re-en. Sec. 609, 1st Div. Comp. Stat. 1887; amd. Sec. 2222, C. Civ. Proc. 1895; re-en. Sec. 7342, Rev. C. 1907; re-en. Sec. 9945, R. C. M. 1921; amd. Sec. 1, Ch. 133, L.

1957; amd. Sec. 5, Ch. 234, L. 1961. Cal. C. Civ. Proc. Sec. 1249.

Amendments

The 1957 amendment added to the first sentence the words "and the cost of re-

removal of all necessary personal property from the condemned real property and of the damage to such personal property, if any, incurred by such removal."

The 1961 amendment deleted "and damages" following the word "compensation" in the first clause of the first sentence; inserted "the service of" before "the summons" in the first sentence; substituted "as of that date" for "at that date" in the first sentence; substituted "for" for "of" following the word "compensation" in the latter part of the first sentence; substituted "depreciation in value" for "damages" in the latter part of the first sentence; deleted from the end of the first sentence the words added by the 1957 amendment; substituted "amount awarded" for "compensation and damages awarded" in the first part of the second sentence; substituted "date on which the property owner surrenders possession of the property in accordance with the terms of such order to the date of receipt of the award or any portion thereof" for "date of such order" in the second sentence; added the proviso to the second sentence; substituted "depreciation in value" for "damages" in the latter part of the third sentence; and added to the third sentence the words "nor shall the same be used as the basis of computing such compensation or depreciation."

Repealing Clause

Section 2 of Ch. 133, Laws 1957 repealed all acts and parts of acts in conflict therewith.

93-9914. (9946) Report of commissioners. The report of commissioners shall be made on such forms as are provided for their use by authority of the court. Such report must be filed within ten (10) days after the completion of the hearing, or within such additional time as may be allowed by the judge, upon a clear showing of necessity therefor, and must be filed with the clerk of court and the clerk must forthwith notify the parties interested that such report has been filed, with notice, together with a true copy of said report, must be served upon all the parties interested, in the same manner as a summons. A concurrence of two (2) commissioners shall be necessary to the making of a final report or award as to any parcel of property, or interest therein. In the event that no two (2) of the said commissioners are able to agree as to the amount of any award they shall report such fact to the judge or court within the time hereinbefore specified and the court must forthwith impanel and appoint new commissioners as hereinbefore provided, which commissioners shall proceed as provided before herein to determine any award upon which the previous commissioners failed to agree.

The report of said commissioners shall also state the number of days, or portions thereof, consumed by the commissioners in performance of their duties as prescribed herein.

Actual Value

"Actual value" as used in this section means market value. *State v. Peterson*, 134 M 52, 328 P 2d 617, 627.

Improvements

"Improvements" upon property are a part thereof. *State v. Peterson*, 134 M 52, 328 P 2d 617, 627.

Market Value

Evidence may be introduced as to the various uses to which the property is adapted, even though it has never been put to such use in fact. *State v. Peterson*, 134 M 52, 328 P 2d 617, 627.

In attempting to ascertain market value, the location of the land, the character of the neighborhood, and all things surrounding the property may be shown. *State v. Peterson*, 134 M 52, 328 P 2d 617, 627.

Unity or contiguity of properties essential to allowance of damages in eminent domain proceedings on account of remaining property. 6 ALR 2d 1193.

New or additional compensation for use by municipality or public of subsurface of street or highway for purposes other than sewers, pipes, conduits for wires, and the like. 11 ALR 2d 180.

Conditions imposed to approval of proposed subdivision map or plat as constituting taking of property for public use without compensation. 11 ALR 2d 532.

History: En. Sec. 2223, C. Civ. Proc. 1895; re-en. Sec. 7343, Rev. C. 1907; re-en. Sec. 9946, R. C. M. 1921; amd. Sec. 6, Ch. 234, L. 1961.

Amendment

The 1961 amendment completely rewrote this section. For previous text, see parent volume.

DECISIONS UNDER FORMER LAW

Commissioner's Assessment Not a Judgment

A commissioner's assessment is not a judgment, but merely an award by the lay commissioners of damages contained in their report, and, where an appeal has

been perfected by the condemnor from the assessment, the condemnor is entitled to have a necessary party added as a party defendant. *State ex rel. State Highway Comm. v. District Court*, — M —, 348 P 2d 132.

93-9915. (9947) Appeal from assessment of commissioners. An appeal from any assessment made by the commissioners may be taken and prosecuted in the court where the report of said commissioners is filed by any party interested. Such appeal must be taken within the period of thirty (30) days after the service upon appellant of the notice of the filing of the award by the service of notice of such appeal upon the opposing party or his attorney in such proceedings and the filing of the same in the district court wherein the action is pending, and the same shall be brought on for trial upon the same notice and in the same manner as other civil actions, and unless a jury shall be waived by the consent of all parties to such appeal, the same shall be tried by jury, and the amount to which appellant may be entitled, by reason of the appropriation of his property, shall be re-assessed upon the same principle as hereinbefore prescribed for the assessment of such amount by commissioners; upon any verdict or assessment by commissioners becoming final, judgment shall be entered declaring that upon payment of such verdict or assessment, together with the interests and costs allowed by law, if any, the right to construct and maintain the highway, railroad, or other public work or improvement, and to take, use and appropriate the property described in such verdict or assessment, for the use and purposes for which said land has been condemned, shall, as against the parties interested in such verdict or assessment, be and remain in the plaintiff and his or its heirs, successors or assigns forever. In case the party appealing from the award of the commissioners in any proceeding, as aforesaid, shall not succeed in changing to his advantage the amount finally awarded in such proceeding, he shall not recover the costs of such appeal, but all the costs of the appellee upon such appeal shall be taxed against and recovered from the appellant; provided, that upon the trial of such appeal, the plaintiff may contest the right of any party or parties thereto to any of the property mentioned and set forth or involved in said appeal, which was located after the preliminary survey of any such highway or railroad, seeking to condemn its right of way under and pursuant to the provisions of this act; provided, such condemnation proceedings are begun within one year after such preliminary survey.

History: En. Sec. 608, p. 220, L. 1887; re-en. Sec. 2224, C. Civ. Proc. 1895; re-en. Sec. 7344, Rev. C. 1907; re-en. Sec. 9947, R. C. M. 1921; amd. Sec. 1, Ch. 145, L. 1927; amd. Sec. 7, Ch. 234, L. 1961.

Amendment

The 1961 amendment inserted the words "and the filing of the same in the district court wherein the action is pending" in the second sentence; substituted "amount"

for "damages" in two places in the second sentence; substituted "the highway" for "such" before "railroad" in the latter part of the second sentence; deleted the words "of damages" which followed "amount" in the first part of the third sentence; and inserted "highway or" before "railroad" in the first proviso to the third sentence.

Commissioner's Assessment Not a Judgment

A commissioner's assessment is not a judgment, but merely an award by the lay commissioners of damages contained in their report, and, where an appeal has been perfected by the condemnor from the assessment, the condemnor is entitled to have a necessary party added as a party defendant. *State ex rel. State Highway Comm. v. District Court*, — M —, 348 P 2d 132.

93-9916. (9948) New proceedings to cure defective title.

References

Cited or applied in *State ex rel. State*

Highway Comm. v. District Court, — M —, 348 P 2d 132, 135 (dissenting opinion).

93-9919. (9951) Final order of condemnation—what to contain, etc.

Condemnor's waiver, surrender or limitation, after award, of rights or part of property acquired by condemnation. 5 ALR 2d 724.

Quotient condemnation report or award by the commissioners or the like. 39 ALR 2d 1208.

93-9920. (9952) Putting plaintiff in possession. At any time after the filing of the preliminary condemnation order or after the report and assessment of the commissioners have been made and filed in the court, and either before or after appeal from such assessment, or from any other order or judgment in the proceedings, the court or any judge thereof at chambers, upon application of the plaintiff, shall have power to make an order that upon payment into court for the defendant entitled thereto of the amount of compensation claimed by the defendant in his answer or the amount assessed, either by the commissioners or by the jury, as the case may be, the plaintiff be authorized, if already in possession of the property of such defendant sought to be appropriated, to continue in such possession; or, if not in possession, that the plaintiff be authorized to take possession of such property and use and possess the same during the pendency and until the final conclusion of the proceedings and litigation, and that all actions and proceedings against the plaintiff on account thereof be stayed until such time; provided, however, that where an appeal is taken by such defendant, the court or judge may, in its or his discretion, require the plaintiff, before continuing or taking such possession, in addition to paying into court the amount assessed, to give bond or undertaking, with sufficient sureties, to be approved by the judge and to be in such sum as the court or judge may direct, conditioned to pay defendant any additional damages and costs over and above the amount assessed, which it may finally be determined that defendant is entitled to for the appropriation of the property, and all damages which defendant may sustain if for any cause such property shall not be finally taken for public uses.

The amount assessed by the commissioners, or by the jury on appeal, as the case may be, shall be taken and considered, for the purposes of this section, until reassessed or changed in the further proceedings, as just compensation for the property appropriated; but the plaintiff, by payment into court of the amount claimed in the answer or the amount assessed, or by giving security as above provided, shall not be thereby

prevented or precluded from appealing from such assessment, but may appeal in the same manner and with the same effect as if no money had been deposited or security given; and in all cases where the plaintiff deposits the amount of the assessment and continues in possession, or takes possession of the property, as herein provided, the defendant entitled thereto, if there be no dispute as to the ownership of the property, may at any time demand and receive upon order of the court, all or any part of the money so deposited, and shall not by such demand or receipt be barred or precluded from his right of appeal from such assessment, but may, notwithstanding, take and prosecute his appeal from such assessment; provided, that if the amount of such assessment is finally reduced on appeal by either party, such defendant who has received all or any part of the amount deposited shall be liable to the plaintiff for any excess of the amount so received by him over the amount finally assessed, with legal interest on such excess from the time such defendant received the money deposited, and the same may be recovered by action; and, provided, further, that upon any appeal from assessment by the commissioners to a jury, the jury may find a less as well as an equal or greater amount than that assessed by the commissioners; and provided, further, that the court shall not order the delivery to any defendant of more than seventy-five (75) per cent of the money deposited on his account except upon posting of bond by such defendant equal to the amount in excess of seventy-five (75) per cent, with sureties to be approved by the court; to repay to the plaintiff such amounts withdrawn as are in excess of his final award in the proceedings.

History: Ap. p. Sec. 596, p. 195, L. 1877; re-en. Sec. 596, 1st Div. Rev. Stat. 1879; amd. Sec. 614, 1st Div. Comp. Stat. 1887; amd. Sec. 2, p. 272, L. 1891; en. Sec. 2229, C. Civ. Proc. 1895; re-en. Sec. 7349, Rev. C. 1907; re-en. Sec. 9952, R. C. M. 1921; amd. Sec. 8, Ch. 234, L. 1961. Cal. C. Civ. Proc. Sec. 1254.

Amendment

The 1961 amendment inserted "after the filing of the preliminary condemnation order or" near the beginning of the section; deleted the words "of damages" which followed "assessment" near the beginning of the section and again in the second proviso to the second paragraph; substituted "of compensation claimed by the defendant in his answer or the amount" for "of damages" in the first part of the first paragraph; deleted "as dam-

ages" which followed "The amount assessed" at the beginning of the second paragraph; inserted "the amount claimed in the answer or" after "payment into court of" in the second paragraph; substituted "upon order of the court, all or any part of" for "from the court" after "demand and receive" in the second paragraph; substituted "all or any part of the amount deposited" for "the amount of the assessment deposited" in the first proviso to the second paragraph; deleted the words "as compensation or damages" which followed "jury may find" in the second proviso to the second paragraph; and added the third proviso to the second paragraph.

Repealing Clause

Section 9 of Ch. 234, Laws 1961 repealed all acts and parts of acts in conflict therewith.

93-9921. (9953) Costs, allowance and apportionment of.

Relinquishment of part of land or incorporeal rights therein as affecting costs. 5 ALR 2d 739.

Liability of condemnor in eminent domain proceedings for fees of expert witnesses who testified for property owner. 18 ALR 2d 1225.

93-9922. (9954) Rules of practice.

Findings of Fact and Conclusions of Law

Where United States district court did

not make findings of fact and state conclusions of law before entry of judgment, case was remanded with directions to

make such findings of fact and state conclusions of law. *Dawson County v. Hagen*, 172 F 2d 387.

Operation and Effect

Under this section, the provisions of sections 93-8601 and 93-8618 are made applicable to condemnation proceedings for a private road of necessity and therefore attorney's fees are not includable as

an expense under 93-9923. *Tomten v. Thomas*, 125 M 159, 232 P 2d 723, 725, 26 ALR 2d 1285.

Right to Open and Close

The party upon whom the burden of proof rests is entitled to open and close. *State v. Peterson*, 134 M 52, 328 P 2d 617, 629.

93-9923. (9955) Private roads.

Expenses of Action

Attorney's fees are not allowed as an expense of a proceeding in condemnation for a private road of necessity under this section or section 32-1401. Section 93-9922 adopts sections 93-8601 and 93-8618 to the proceedings. Under 93-8601 attorney's fees in condemnation proceedings are not enumerated, nor are they allowed under 93-8618 as a cost or disbursement less specifically authorized by law or is according to the course and custom of the court. In Montana it is not customary to include attorney's fees as a cost; and in

this section and 32-1401 the term "expenses" is synonymous with the term "costs." *Tomten v. Thomas*, 125 M 159, 232 P 2d 723, 725, 26 ALR 2d 1285.

Rights of Way of Necessity

There are no implied grants or reservations of rights of way of necessity in Montana. Property for roads must be condemned. *Simonson v. McDonald*, 131 M 494, 311 P 2d 982, 984, overruling *Herrin v. Sieben*, 46 M 226, 127 P 323; *Violet v. Martin*, 62 M 335, 205 P 221.

93-9925. (9957) Temporary logging roads.

References

Cited in *Simonson v. McDonald*, 131 M 494, 311 P 2d 982, 984.

CHAPTER 100—NAMES—CHANGE OF NAMES OF PERSONS—OF WATERCOURSES

93-100-1. (9963) Jurisdiction.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

CHAPTER 101—BIRTH DATE—PROCEDURE FOR JUDICIAL DETERMINATION

93-101-1. Birth date—judicial determination thereof.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

Computation of one's age by inclusion or exclusion of day of birth. 5 ALR 2d 1143.

CHAPTER 201—ARBITRATION—SUBMISSION TO

93-201-1. (9972) What may be submitted to arbitration, and when.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

Violation or repudiation of contract as affecting right to enforce arbitration clause therein. 3 ALR 2d 383.

93-201-6. (9977) Award to be in writing—when judgment to be entered.

Quotient arbitration award or appraisal.
20 ALR 2d 958.

93-201-7. (9978) Award may be vacated in certain cases.

Honest Effort by Arbitrators

Heating and plumbing contractor was entitled to enforcement of report of arbitrators against school district where arbitrators made a sincere, honest and industrious effort to render a fair and just award. *Hopkins v. School District No. 40*,

Missoula County, 133 M 530, 327 P 2d 395, 398.

Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award. 27 ALR 2d 1160.

Loss of right to arbitration through laches. 37 ALR 2d 1125.

93-201-8. (9979) Court may, on motion, modify or correct the award.

References

Cited in *Hopkins v. School District No.*

40, Missoula County, 133 M 530, 327 P 2d 395, 399.

CHAPTER 301—EVIDENCE—DEFINITIONS—KINDS AND DEGREES OF

93-301-1. (10488) Definition of evidence.

Bloodhound Testimony

In this state, so-called "bloodhound testimony" is incompetent and inadmissible

on the trial of any person accused of a crime. *State v. Storm*, 125 M 346, 238 P 2d 1161 (two justices dissenting).

93-301-4. (10491) The degree of proof required to establish facts.

Degree of Proof

The law does not require demonstration. It does not require such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty is only required, or that degree of proof which produces conviction in an unprejudiced mind. *State v. Reid*, 127 M 552, 267 P 2d 986, 990.

Defendant was found guilty by a jury, it was held on appeal that in view of the uncertainty in the mind of the state's only eyewitness as compared with witnesses for defendant, coupled with the effect of this section and section 94-7203, the evidence was not sufficient to justify a conviction for the crime charged. *State v. Gilbert*, 125 M 104, 232 P 2d 338, 341.

References

Operation and Effect
In a prosecution for the crime of carrying a concealed weapon, wherein the de-

Cited or applied in *Gaffney v. Industrial Accident Board of Montana*, 129 M 394, 287 P 2d 256, 261.

93-301-5. (10492) Four kinds of evidence specified.

Mode of proof of testimony given at former examination, hearing or trial. 11 ALR 2d 30.

93-301-6. (10493) Several degrees of evidence specified.

Bloodhound Testimony

In this state, so-called "bloodhound testimony" is incompetent and inadmissible

on the trial of any person accused of a crime. *State v. Storm*, 125 M 346, 238 P 2d 1161 (two justices dissenting).

93-301-7. (10494) Primary evidence defined.

References

Cited or applied in *Cottingham v. Doyle*, 122 M 301, 202 P 2d 533.

93-301-10. (10497) Indirect evidence defined.

References

Cited or applied in *Gaffney v. Industrial Accident Board of Montana*, 129 M 394, 287 P 2d 256, 261.

93-301-11. (10498) Prima facie evidence defined.**References**

Cited or applied in *Whitney v. Northwest Greyhound Lines*, 125 M 528, 242 P 2d 257, 270 (dissenting opinion).

Prima facie case where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water. 13 ALR 2d 681.

93-301-13. (10500) Satisfactory evidence defined.**References**

Cited or applied in *State v. Simon*, 126

M 218, 247 P 2d 481, 485 (dissenting opinion).

93-301-17. (10504) Corroborative evidence defined.

Divorce: Necessity and sufficiency of corroboration of plaintiff's testimony re-

garding ground for divorce. 15 ALR 2d 170.

CHAPTER 401—EVIDENCE—GENERAL PRINCIPLES OF

93-401-1. (10505) One witness sufficient to prove a fact.**Conflicting Evidence**

Where there is any substantial evidence to support the findings of the trial court, even though the evidence is conflicting the supreme court will not interfere with the judgment and findings of the trial court. *Hankins v. Waitt*, 120 M 596, 189 P 2d 666, 667.

Operation and Effect

In deciding the facts of a case the trial judge could accept "the direct evidence of one witness who is entitled to full

credit" to prove any fact and he was not bound to decide the facts in conformity with the declarations of any number of witnesses, who did not produce conviction in his mind, against a less number, or against a presumption or other evidence satisfying his mind. *Davis v. Burton*, 128 M 134, 278 P 2d 213, 218.

References

Cited or applied in *Whorley v. Koss*, 122 M 446, 206 P 2d 809, 811.

93-401-2. (10506) Testimony confined to personal knowledge.

Report by physician taking or interpreting X-ray pictures. 6 ALR 2d 406.

Written recitals or statements as within rule excluding hearsay. 10 ALR 2d 1035.

93-401-4. (10508) Witness presumed to speak the truth.**Construction**

It was error for the trial court to allow the testimony of a witness at the first trial to be read into evidence at the second trial of the defendant. It was the right of the defendant to have the jury see and observe the witness upon the witness stand. It was his right that the jury see how the witness acted while under direct and cross-examination. It was his right to have the jury judge the credibility of the witness from his appearance and manner while upon the witness stand. None of these rights could be had except and unless the witness met the defendant "face to face" in the presence of the jury during the course of the trial. *State v. Storm*, 127 M 414, 265 P 2d 971, 973. (See, however, the dissenting opinion in 127 M 414, 265 P 2d 971, 975.)

Cases which permit testimony, given by a witness in a first trial, to be read into evidence in a second trial, in the absence of such witness, are based upon the

theory that the accused has been present when the witness gave the testimony in the first trial and had the opportunity of then cross-examining such witness. Such cases proceed upon the theory that the observation by the jury of the manner and demeanor of the witness is no essential part of the right of a defendant to meet the witness face to face. Montana subscribes to no such theory. To do so would be to make this section a useless and meaningless thing and would deny the defendant the right to meet the witness against him face to face, a right guaranteed him by Art. III, sec. 16 of the state Constitution. *State v. Piveral*, 127 M 427, 265 P 2d 969, 970. (See, however, the dissenting opinion in 127 M 427, 265 P 2d 969, 970.)

On a second trial of a defendant the testimony of a state witness given at the first trial could not be read into evidence at the second trial since to do so would be to deprive the defendant of his

right to meet a witness face to face. *State v. Piveral*, 127 M 427, 265 P 2d 969, 970. (See, however, the dissenting opinion in 127 M 427, 265 P 2d 969, 970.)

Operation and Effect

Where there is ample substantial evidence to sustain a jury's verdict the su-

preme court will not disturb it. *Roberts State Bank v. O'Rourke*, 121 M 228, 191 P 2d 321.

References

Cited in *Olson v. McLean*, 132 M 111, 313 P 2d 1039, 1041; *Thomas v. Merriam*, 135 M 121, 337 P 2d 604, 607.

93-401-7. (10511) Declarations which are a part of the transaction.

Admission Against Interest

Where statements made by defendant tended to incriminate him they were admissible under section 93-401-27 as statements against interest regardless whether or not they were part of the *res gestae*. *State v. Allison*, 122 M 120, 199 P 2d 279, 293.

Operation and Effect

In a prosecution for the crime against nature, it was error to permit the mother of the prosecuting witness to testify as to details of the crime as related by him when he complained to her, where there was no showing that the statement was made while in shock or immediately after the crime. *State v. Shambo*, 133 M 305, 322 P 2d 657.

In a prosecution for the crime against nature, the person to whom the complaint

was made could testify to that fact and state the time, place and circumstances under which it was made but not what was said concerning the details of the crime. *State v. Shambo*, 133 M 305, 322 P 2d 657, 659.

Statement of Future Intentions

Declaration by decedent that "I am buying a ranch and placing it in Bill's name until I get rid of my wife" was inadmissible in an action to establish a resulting trust, since it was a narrative statement of future intentions and not a statement of present ownership. *Platts v. Platts*, 134 M 474, 334 P 2d 722, 730.

Inability of person making utterance to recollect and narrate facts to which it relates as affecting its admissibility as part of *res gestae*. 7 ALR 2d 1324.

93-401-10. (10514) Declaration of decedent evidence, etc.

References

Cited or applied in *Snook v. Blank*, 92 F Supp 518, 519; *Hjermstad v. Barkuloo*, 128 M 88, 270 P 2d 1112, 1118.

Admissibility of statement accepting responsibility for accident as affected by reference to liability insurance. 4 ALR 2d 781.

93-401-12. (10516) Contents of writing—how proved.

Subd. 5

Operation and Effect

The receiving in evidence of exhibits of one of the counsel of plaintiff which contained figures taken from the books of account kept by plaintiff from which computation was made of the loss of profits to plaintiff by reason of defendant's negligence was proper. *McCollum v. O'Neil*, 128 M 584, 281 P 2d 493.

The use of memoranda containing computations made from records is proper. This method of getting before the jury the result of the examination of books of account and records is to be commended. *McCollum v. O'Neil*, 128 M 584, 281 P 2d 493, 497.

In General

This section does not authorize the introduction of parol evidence to show the execution of a deed where the entire deed is in evidence including the printed lines for the signature of the party executing the instrument and also the lines for the notary but no signatures appear thereon and the paper gives no evidence that any signatures ever appeared thereon, although plaintiff claimed that the signatures disappeared while the deed was in the ground for a period of nine years. *Miller v. Miller*, 121 M 55, 190 P 2d 72, 74.

References

Cited or applied in *Cottingham v. Doyle*, 122 M 301, 202 P 2d 533.

93-401-13. (10517) An agreement reduced to writing deemed the whole.

Exception to Establish Fraud

In an action by the payees against the makers for the balance due on a renewal note, where there was fraud and partial failure of consideration and one of the makers testified that he did not know how

to figure interest, the makers were not precluded from showing that the contract was different from what the writing showed it to be. *Jensen v. Franklin*, 135 M 341, 340 P 2d 832.

Exclusion of Oral Evidence

Trial court could have excluded evidence relating to a joint venture, none of which was in writing, as being designed to alter or vary the terms of a written agreement contrary to this section and section 13-907. *Barrett v. Morton*, — M —, 351 P 2d 601, 605.

Extension of Time—Oral Testimony

Where escrow agreement in connection with sale of land required \$700 to be paid by a certain date, oral evidence could not be received to show that there had been an extension of time. *Herman v. Herman*, 123 M 39, 207 P 2d 1155, 1157, distinguished in 318 P 2d 257.

Reservation of Mineral Interest

In action for specific performance arising over interpretation of contract for conveyance of land reserving mineral interest; where cross-complaint of defend-

ants alleged that the contract was ambiguous and uncertain and prayed for a declaratory judgment to adjudicate the rights of the parties, it was the duty of the trial court to determine the intent of the parties, and the exclusion of parol evidence of intent was error. *Stokes v. Tutvet*, 134 M 250, 328 P 2d 1096, 1103, 1104.

References

Cited or applied in *Potlatch Oil & Refining Co. v. Ohio Oil Co.*, 96 F Supp 685, 689.

Applicability and effective parol evidence rule as determinable upon the pleadings. 10 ALR 2d 720.

Parol evidence rule as applicable to agreement not to engage in competition with a business sold. 11 ALR 2d 1227.

Parol evidence to show duration of written contract for support or maintenance. 14 ALR 2d 897.

93-401-15. (10519) Construction of statutes and instruments, etc.

Addition of Omitted Matter

Supreme Court is not at liberty to so amend a statute as passed by the legislature and approved by the governor. It must determine the plain meaning of the words used and is not at liberty to add in the statute what has been omitted. In *re Coleman's Estate*, 132 M 339, 317 P 2d 880, 882.

Operation and Effect

In construing section 93-901 relating to the disqualification of a judge for bias or prejudice, by the filing of an affidavit, the court may not insert therein any "withdrawal" provisions. In *re Woodside-Flourance Irr. Dist.*, 121 M 346, 194 P 2d 241, 245.

A judge should not read the words "grand jury" into section 94-2423 which provides immunity from prosecution to persons testifying before any "court or magistrate." *State v. Saginaw*, 124 M 225, 220 P 2d 1021, 1023, distinguished in 300 P 2d 953.

93-401-16. (10520) The intention of the legislature or parties.

Action of County Commissioners

Rules of construction prescribed by this section would be applicable in construing action of board of county commissioners in fixing salary of county officer. *State ex rel. Thompson v. Gallatin County*, 120 M 263, 184 P 2d 998, 1002.

Life Insurance

Particular intent will control a general one in statute relating to life insurance as part of estate. In *re Coleman's Estate*, 132 M 339, 317 P 2d 880, 882.

The court could not add to the tax statutes a provision granting a special tax status to breeding animals. In *re Armstrong's Estate*, 133 M 328, 323 P 2d 595, 596, 597.

References

Cited or applied in *Lindeen v. Liquor Control Board*, 122 M 549, 207 P 2d 947; *State v. Coloff*, 125 M 31, 231 P 2d 343, 346; *Bond v. Birk*, 126 M 250, 247 P 2d 199, 206; *Tabor v. Industrial Acc. Fund*, 126 M 240, 247 P 2d 472, 477 (dissenting opinion); *Sheridan County Electric Co-op. v. Montana-Dakota Utilities Co., Inc.*, 128 M 84, 270 P 2d 742, 743; In *re Woodburn's Estate*, 128 M 145, 273 P 2d 391, 394; *Hutterian Brethren of Wolf Creek v. Haas*, 116 F Supp 37; *State ex rel. Burns v. Lacklen*, 129 M 243, 284 P 2d 998, 1004; *Carlson v. Flathead County*, 130 M 24, 293 P 2d 273, 275; *Hill v. Billings*, 134 M 282, 328 P 2d 1112, 1114.

Operation and Effect

Since the original legislative intent in enacting Laws 1933, Ch. 105, was by Sec. 65 (sec. 4-170) to prohibit billboard or signboard advertising of beer, it cannot be said that the legislature of 1949 in enacting Ch. 209 (sec. 4-102) for the purpose of clarifying the distinction between liquor and beer intended to repeal such prohibition without specifically repealing such provision. *Fletcher v. Paige*, 124 M 114, 220 P 2d 484, 487, 19 ALR 2d 1108.

Subsequent Declarations of Trustor

Subsequent declarations of the trustor are relevant and are to be considered in determining the meaning of the word "issue" used in an instrument creating a trust. *Holter v. First Nat. Bank & Trust Co. of Helena*, 135 M 27, 336 P 2d 701.

References

Cited in *McCarten v. Sanderson*, 111 M 407, 100 P 2d 1108, 1111, 132 ALR 1220; *Carlson v. Flathead County*, 130 M 24, 293 P 2d 273, 275; *Hill v. Billings*, 134 M 282, 328 P 2d 1112, 1114; *Guidici v. Minerals Engineering Co.*, — M —, 348 P (2d) 354, 362.

93-401-17. (10521) The circumstances to be considered.**References.**

Cited or applied in *First Nat. Bank of Plains v. Green Mt. Soil Conservation Dis-*

trict, 130 M 1, 293 P 2d 289, 291; *Stokes v. Tutvet*, 134 M 250, 328 P 2d 1096, 1104.

93-401-20. (10524) Persons skilled may testify to decipher characters.

Admissibility of expert testimony as to proximate cause in malpractice cases. 13 ALR 2d 38.

93-401-21. (10525) Of two constructions, which preferred.**References**

Cited or applied in *Guidici v. Minerals*

Engineering Co., — M —, 348 P 2d 354, 362.

93-401-25. (10529) Evidence confined to material allegations.**Operation and Effect**

Where testimony is in conflict it is not reversible error for the court to admit evidence of collateral facts to determine the credibility of the witnesses. *O'Sullivan v. Simpson*, 123 M 314, 212 P 2d 435.

On cross-examination, questions as to the extent of sweeping done by the witness in performance of his duties at work is collateral and does not affect the credibility of the witness on the vital point that he followed the green truck after weighing it and saw defendants scoop corn from it onto another truck. *State v. Keller*, 126 M 142, 246 P 2d 817, 819.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance. 4 ALR 2d 761.

Admissibility in negligence action against bank by depositor, of evidence as to custom of banks in locating and dealing with checks and other items involved. 8 ALR 2d 446.

Use and admissibility of maps, plats and other drawings to illustrate or express testimony. 9 ALR 2d 1044.

93-401-27. (10531) Facts which may be proved on trial.**Subd. 2****Criminal Case**

In criminal case, statements of defendant voluntarily made to doctor who was to perform autopsy on deceased were admissible as statements against interest. *State v. Allison*, 122 M 120, 199 P 2d 279, 293.

Subd. 4**"Against Interest" to Real, Not Personal Property**

A resulting or constructive trust in personal property cannot be established by testimony of the deceased constituting a declaration made against his interest therein. *Platts v. Platts*, 134 M 474, 334 P 2d 722, 729.

Dying Declarations

It is within the discretion of the trial judge as to whether or not the jury should be present when the foundation for the admission of the dying declaration is being laid. Should the trial judge find the foundation sufficient and decide to admit the dying declaration in the absence of the jury, then the whole procedure is repeated for and in the record in the presence of the jury. *State v. Morran*, 131 M 17, 306 P 2d 679, 686.

There was a proper foundation for the admission of a dying declaration where it was shown that the deceased made statements that he was going to die; that he was "going down for the long count"; because he was told by his doctors that he was going to die of his burns; be-

cause he knew and appreciated that his doctor was telling him the truth; because he received the last rites of his church; because he knew that an accomplice had died of burns and knew that his own burns were nearly as bad. All of these facts and circumstances warrant the conclusion that the declaration was made under a sense of impending death. *State v. Morran*, 131 M 17, 306 P 2d 679, 687. (Dissenting opinion on this point, 131 M 17, 306 P 2d 679, 691.)

Where a dying declaration contains objectionable portions, such objectionable portions may be stricken, but it is incumbent upon the defendant to specify the objectionable parts and give the reason why such parts are objectionable. *State v. Morran*, 131 M 17, 306 P 2d 679, 688. (Dissenting opinion on this point, 131 M 17, 306 P 2d 679, 689.)

Subd. 9

Weight of Testimony

Expert opinions are to be received and weighed on the same basis as other testimony. *State v. London*, 131 M 410, 310 P 2d 571, 586.

The court in a proper case should instruct the jury as to such testimony in order that they may have a guide to the manner in which they should consider and weigh the opinions of such experts. *State v. London*, 131 M 410, 310 P 2d 571, 586.

CHAPTER 501—EVIDENCE—JUDICIAL NOTICE OF FACTS AND FOREIGN LAWS

93-501-1. (10532) Certain facts of general notoriety, etc.

Subd. 1

Vodka as Intoxicating Liquor

While section 94-35-107 does not use the word "vodka" as an intoxicating liquor, it does make any beverage containing more than one-half of one per cent of alcohol an intoxicating liquor and under this section the court may take judicial notice of the commonly accepted and generally understood definition of the word "vodka." *State v. Wild*, 130 M 476, 305 P 2d 325, 334.

Subd. 2

Boundaries of Counties

The courts will take judicial notice of the boundaries of the various counties as established, fixed and defined by sections 16-201 to 16-263 and of the territorial limits of such political subdivisions of the state as such limits are shown and depicted on the official map of the state

Subd. 10

"Intimate Acquaintance"

The testimony of intimate friends and acquaintances of a decedent who visited him at the hospital during his last illness both before and after a contested will was made was admissible under this section, and the reasons for their opinions that he did not understand what was going on about him and did not know what he was doing, were sufficient to support the opinion of incompetence which they expressed. *In re Dillenburg's Estate*, — M —, 349 P 2d 573, 574.

Mental competency of deceased may be shown by opinions of intimate acquaintances. *Lacey v. Harmon*, — M —, 353 P 2d 96, 98.

References

Cited or applied in *State v. Storm*, 127 M 414, 265 P 2d 971, 976 (dissenting opinion); *State v. Pivaler*, 127 M 427, 265 P 2d 969, 970 (dissenting opinion).

Estimate or opinion as to value of personal property having no market value in action for conversion or loss of, or damage to, such property. 12 ALR 2d 935.

Admissibility on question of damages in action for libel or slander, of opinion evidence as to impression or effect of matter upon minds of individuals. 12 ALR 2d 1016.

under section 19-117. *State v. Williams*, 122 M 279, 202 P 2d 245, 246.

Subd. 3

Acts of an Official

The law presumes that the commissioner of agriculture performed his official duty as required by section 3-218 and that the form of warehouse receipt used and issued by plaintiff is in the form prescribed by law and the rules and regulations of the commissioner of agriculture of which law and official acts the Supreme Court may take judicial notice. *Northern Montana Mustard Growers Co-op. v. Britton*, 128 M 553, 280 P 2d 1078, 1085.

Location of City

Where the official highway map shows that the town of Greycliff is ten miles east of Big Timber, on the Yellowstone River the courts will take judicial notice of such facts. *State v. Widdicombe*, 130 M 325, 301 P 2d 1116, 1118.

References

Cited or applied in *In re Hunter's Estate*, 125 M 315, 236 P 2d 94, 96.

Judicial notice of federal nature of defendant for purposes of jurisdiction of federal courts. 12 ALR 2d 55.

Judicial notice of changes in cost of living or in purchasing power of money in reviewing damages for personal injuries or death. 12 ALR 2d 611.

Judicial notice as to finger prints, paw prints or bear foot prints. 28 ALR 2d 1119.

93-501-2. Judicial notice of laws of other states.**References**

Cited or applied in *In re Hunter's Estate*, 125 M 315, 236 P 2d 94, 96; *In re*

Stoian's Estate, 128 M 52, 269 P 2d 1085, 1088; *Malecom v. Stondall Land & Investment Co.*, 129 M 142, 284 P 2d 258, 260.

93-501-3. Court may inform itself of such laws.**References**

Cited or applied in *In re Hunter's Estate*, 125 M 315, 236 P 2d 94, 96.

93-501-4. Question for court.**References**

Cited or applied in *In re Hunter's Estate*, 125 M 315, 236 P 2d 94, 96.

93-501-5. Notice to adverse party, when required.**Notice**

Assuming that the findings of a California court that there was reciprocity between the United States and Rumania was the common law of that state, still before a party invokes the benefits of such foreign law he must give notice to

the adverse party of his intention to do so before asking the court to take judicial notice thereof. *In re Stoian's Estate*, 128 M 52, 269 P 2d 1085, 1088. (Dissenting opinions, 128 M 52, 269 P 2d 1085, 1088. 1089.)

93-501-8. Act, how cited.

Uniform Judicial Notice of Foreign Law Act. 23 ALR 2d 1437.

CHAPTER 601—EVIDENCE—REPORTERS' CONFIDENCE ACT

Section 93-601-2. Disclosure of source of information—when not required.

93-601-2. Disclosure of source of information—when not required. No persons engaged in the work of, or connected with or employed by any newspaper or any press association, or any radio broadcasting station, or any television station for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, broadcasting or televising news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial or investigation before any court, grand jury or petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent or agents, or before any commission, department, division or bureau of the state, or before any county or municipal body, officer or committee thereof.

History: En. Sec. 2, Ch. 195, L. 1943; amd. Sec. 1, Ch. 56, L. 1951.

television station" and "broadcasting or televising."

Amendment

The 1951 amendment inserted the words "or any radio broadcasting station, or any

Repealing Clause

Section 2 of Ch. 56 L. 1951 repealed all acts or parts of acts in conflict therewith.

CHAPTER 701—EVIDENCE—WITNESSES

93-701-1. (10533) Witness defined.

Competency of physician or surgeon from one community to testify in malpractice case as to standard of care re-

quired of defendant practicing in another community. 8 ALR 2d 772.

93-701-2. (10534) All persons capable of perceptions, etc.

Testimony of children as to grounds of divorce of their parents. 2 ALR 2d 1329.

93-701-3. (10535) Persons who cannot be witnesses.**Subd. 1**Operation and Effect

Where prosecuting witness in an assault case had been adjudicated mentally incompetent in 1938 and was not officially restored to capacity until two years after offense was committed but that was more than year prior to the trial, the district court did not err in allowing the person to testify regarding the assault. *State v. Cockrell*, 131 M 254, 309 P 2d 316, 320.

Subd. 2Whether Child is Competent within Discretion of Trial Judge

Whether or not a child is competent to testify rests within the discretion of the trial judge and his conclusion will not be disturbed unless there has been an abuse of discretion. *State v. Shambo*, 133 M 305, 322 P 2d 657, 659.

Subd. 3Competency After Testimony of Another

In action on claim against estate for money loaned by daughter to deceased, it was proper, after testimony of witness that she heard plaintiff say, "Could I have the money you owe me, Mother?" to which the mother replied "Yes, I owe you \$520 and you will get every cent of it," to permit plaintiff to testify in her own behalf concerning the making of the loan to her mother. *Ahlquist v. Pinski*, 120 M 355, 185 P 2d 499, 501.

Operation in General

A party to an action to enforce a contract to make a will may not testify as to the facts of direct transactions or oral communications between himself and the deceased, except when, without the testimony of the witness injustice will be done. *Cox v. Williamson*, 124 M 512, 227 P 2d 614, 619.

Court should not admit testimony of witness who is party to case to enforce agreement alleged to have been made with deceased until sufficient other independent testimony has been admitted to warrant the court, in exercise of its discretion, to

render a ruling in favor of such testimony, which discretion must be exercised with caution and reasonable strictness. *Cox v. Williamson*, 124 M 512, 227 P 2d 614, 619.

Sufficiency of Foundation Evidence

Evidence which tends to establish at most nothing more than an intention on the part of the testator to leave to another a certain sum of money, will not support an allegation of express agreement or contract to do so, so as to permit testimony of plaintiff as to contract made with deceased. *Cox v. Williamson*, 124 M 512, 227 P 2d 614, 621.

Where there was no other evidence to establish the loan, it was not an abuse of discretion to reject plaintiff's testimony as to direct transactions or oral communications between plaintiff and decedent in connection with the alleged loan. *Mowbray v. Mowbray*, 131 M 580, 312 P 2d 995.

Subd. 4Operation and Effect

Where there was absolutely no evidence, independent of the testimony of the plaintiff, corroborating the existence of an express contract whereby a deceased corporation president agreed to hire the plaintiff, plaintiff was barred from testifying as to the alleged oral contract. *Johnson v. Mommoth Lode & Uranium Exploration Corp.*, — M —, 348 P 2d 267.

Under the exception to this section, which allows the testimony of a party or assignor "when it appears to the court that without the testimony of the witness injustice will be done" there must first be sufficient other testimony admitted to warrant the court, in the exercise of its discretion to rule in favor of the questionable testimony. *Potlatch Oil & Refining Co. v. Ohio Oil Co.*, 199 F 2d 766.

Under the Montana dead mens statute, the testimony of an assignor of the plaintiff relating to a conversation with one of defendant's officers was properly excluded since the officer of defendant was now dead, nor was it admissible under Rule 43 (a) of the Federal Rules since the witness, a stockholder of plaintiff cor-

poration, was interested in the outcome of the suit. *Potlatch Oil & Refining Co. v. Ohio Oil Co.*, 199 F 2d 766.

Oil & Refining Co. v. Ohio Oil Co., 96 F Supp 685, 688; *Feely v. Lacey*, 133 M 283, 322 P 2d 1104, 1108.

References

Cited or applied in *O'Sullivan v. Simpson*, 123 M 314, 212 P 2d 435; *Potlatch*

Competency of witness as affected by coverage of pardon. 35 ALR 2d 1262.

93-701-4. (10536) Persons in certain relations cannot be examined.

Subd. 1

Testimony by Widow

Objection to testimony by widow as to statements made by deceased spouse was properly overruled where it was shown that deceased did not regard the communications as confidential in that he had made the communications to others beside his wife. *Thompson v. Steinkamp*, 120 M 475, 187 P 2d 1018, 1021, distinguished in 334 P 2d 729.

Right of one against whom testimony is offered to invoke privilege of communication between others. 2 ALR 2d 645.

Conversations between husband and wife relating to property or business as within rule excepting private communications between them. 4 ALR 2d 835.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of another spouse. 10 ALR 2d 1387.

Cross-Reference

Testimony of husband or wife in support proceedings, sec. 94-901-18.

CHAPTER 801—EVIDENCE—UNIFORM BUSINESS RECORDS AS EVIDENCE ACT—UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT

Section 93-801-5. Reproductions of originals.
93-801-6. Interpretation of act.

93-801-1. "Business" defined.

References

Cited or applied in *Richardson v. Farmers Union Oil Co.*, 131 M 535, 312 P 2d 134, 143.

tickets, bills, invoices, etc., made in regular course of business, under the Uniform Business Records as Evidence Act, or under similar "Model Acts." 21 ALR 2d 773.

Verification and authentication of slips,

93-801-2. Proof of business records.

Bank Records

In action by administratrix to recover amount of automobile purchase loan made by decedent to defendant, bank records of decedent's checking account were properly admitted as evidence. *Olson v. McLean*, 132 M 111, 313 P 2d 1039, 1042, 1043.

while it was a going concern, were admissible in evidence. *McGrath v. Dubs*, 127 M 101, 257 P 2d 899, 905.

In order to justify the admission of a record it is incumbent upon the court to require, as a part of the foundation, evidence as to the sources of information, method and time of preparation. *Richardson v. Farmers Union Oil Co.*, 131 M 535, 312 P 2d 134, 143.

Operation and Effect

The reports on an accountant, who was hired to do accounting for the company

93-801-4. Act, how cited.

What constitutes books or original entry within rule as to admissibility of books of account. 17 ALR 2d 235.

93-801-5. Reproductions of originals. If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any

memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding, whether the original is in existence or not, and an enlargement or facsimile of such reproduction is likewise admissible in evidence, if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

History: En. Sec. 1, Ch. 100, L. 1953.

Pennsylvania, South Dakota, Virginia, Washington and Wisconsin.

Compiler's Note

The Uniform Photographic Copies of Business and Public Records as Evidence Act has been adopted by Alabama, Alaska, California, Florida, Georgia, Hawaii, Idaho, Iowa, Maryland, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma,

Title of Act

An act relating to the preservation of business and public records by the preparation of photographic copies thereof, providing that the originals thereof may be destroyed under certain conditions and that such copies may be used in place of the original.

93-801-6. Interpretation of act. This act shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it.

History: En. Sec. 2, Ch. 100, L. 1953.

all acts or part of acts inconsistent with the provisions of this act.

Repealing Clause

Section 3 of Ch. 100, Laws 1953 repealed

CHAPTER 901—EVIDENCE—UNIFORM OFFICIAL REPORTS AS EVIDENCE ACT

93-901-1. Official reports admissible as evidence.

Operation and Effect

In a negligence action this section did not permit the admission of an air force accident report, prepared under an air

force regulation, because it was not prepared by an officer of this state. *Richardson v. Farmers Union Oil Co.*, 131 M 535, 312 P 2d 134, 144.

CHAPTER 1001—EVIDENCE—PUBLIC WRITINGS

93-1001-8. (10546) Written law defined.

References

Cited or applied in *In re Gaspar's Estate*, 128 M 383, 275 P 2d 656, 661.

Use and admissibility of maps, plats and other drawings to illustrate or express testimony. 9 ALR 2d 1044.

93-1001-9. (10547) Constitution and statutes.

References

Cited in *State ex rel. Bennett v. Bonner*, 123 M 414, 214 P 2d 747; *Bond v. Birk*, 126 M 250, 247 P 2d 199, 206; *State ex rel. Reid v. District Court*, 126 M 489,

255 P 2d 693, 703; *In re Kay's Estate*, 127 M 172, 260 P 2d 391, 394; *State ex rel. Burns v. Lacklen*, 129 M 243, 284 P 2d 998, 1004; *Ruona v. City of Billings*, — M —, 323 P 2d 29, 32 (dissenting opinion).

93-1001-11. (10549) Unwritten law defined.**References**

Cited or applied in *In re Gaspar's Estate*, 128 M 383, 275 P 2d 656, 661; *In re*

Spoya's Estate, 129 M 83, 282 P 2d 452, 455.

93-1001-14. (10552) Other evidence of laws of other states.**Operation and Effect**

Under this section it was proper for a foreign law expert to testify as to reciprocity between this country and a foreign country in regard to inheritance rights of the citizens. *In re Spoya's Estate*, 129 M 83, 282 P 2d 452, 454.

Under this section it was proper for the

Consul General of Yugoslavia to give testimony as to reciprocity between Yugoslavia and the United States. *In re Ginn's Estate*, — M —, 347 P 2d 467, 469.

References

Cited or applied in *In re Gaspar's Estate*, 128 M 383, 275 P 2d 656, 661.

93-1001-19. (10557) Copy of a foreign record—when evidence.**Operation and Effect**

Certified copies of decisions of district courts, containing the seal of the court properly authenticated and in substantial compliance with this section, showing in substance that in the cases under consideration American citizens either in-

herited property from the estate of one dying in Yugoslavia or the decisions otherwise respected property rights of American citizens in property in Yugoslavia were properly received in evidence to show reciprocity. *In re Spoya's Estate*, 129 M 83, 282 P 2d 452, 456.

93-1001-20. (10558) Effect of a judgment or final order upon rights, etc.**Decree of Settlement of Final Account and Distribution of Estate**

A decree of distribution does not concern itself with, and is not the final order of the court on the point of, the payment of legacies, but that is the office of the decree of discharge under section 91-3906. *Hustad v. Reed*, 133 M 211, 321 P 2d 1083, 1092.

Effect of Judgment or Order in General

A judgment or final order in an action or proceeding is not evidence, conclusive or otherwise, of matters that were not involved in the proceeding and not determined. *Hustad v. Reed*, 133 M 211, 321 P 2d 1083, 1091.

Conclusiveness of allowance of account of trustee or personal representative as

respects self-dealing in assets of estate. 1 ALR 2d 1060.

Res judicata as affected by fact that former judgment was entered by agreement or consent. 2 ALR 2d 514.

Judgment as *res judicata* pending appeal or motion for a new trial, during the time allowed therefor. 9 ALR 2d 984.

Judgment in suit for cancellation of restrictive covenant on ground of change in neighborhood as *res judicata* in suit for injunction against enforcement of covenant on that ground, and vice versa. 10 ALR 2d 357.

Status of judgment or order as *res judicata* as affected by subsequent dismissal, discontinuance or nonsuit. 11 ALR 2d 1420.

93-1001-23. (10561) What deemed adjudged in a judgment.**References**

Cited or applied in *Hustad v. Reed*, 133 M 211, 321 P 2d 1083, 1091.

93-1001-29. (10567) The jurisdiction necessary in a judgment.**References**

Gans & Klein Invest. Co. v. Sanford et al., 91 M 512, 521, 8 P 2d 808.

93-1001-30. (10568) Manner of proving other official documents.**Subd. 8****Operation and Effect**

In a proceeding for the determination of reciprocity of inheritance rights of heirs residing in Yugoslavia, a certificate executed by the Minister of Justice of Yugoslavia whose signature was authenti-

cated by the Minister of Foreign Affairs of Yugoslavia and which carried the standard legalization of the document by the United States Embassy at Belgrade, was admissible under the provisions of this section. *In re Ginn's Estate*, — M —, 347 P 2d 467, 469.

93-1001-32. (10570) Entries in official books prima facie evidence.**Location of City**

Where official highway map shows that the town of Greycliff is ten miles east of Big Timber on the Yellowstone River the courts will take judicial notice of such facts. *State v. Widdicombe*, 130 M 325, 301 P 2d 1116, 1118.

Reports of Livestock Inspector

Reports made by the livestock inspector pursuant to section 3324, Revised Codes 1935 (Repealed Ch. 59, Laws 1943. See section 46-802) were admissible in evidence as public records. *Smith v. Armstrong*, 121 M 377, 198 P 2d 795, 800.

93-1001-38. (10576) Entries made by officers or boards, etc.**Reports of Livestock Inspector**

Reports made by the livestock inspector pursuant to section 3324, Revised Codes 1935 (Repealed Ch. 59, Laws 1943. See

section 46-802) were admissible in evidence as public records. *Smith v. Armstrong*, 121 M 377, 198 P 2d 795, 800.

CHAPTER 1101—EVIDENCE—PRIVATE WRITINGS

93-1101-12. (10588) Writings—how proved.**Sufficiency of Evidence**

Where one of witnesses testified that signature on note was that of defendant and identified the note, it was sufficient to admit the note in evidence. *Betor v. Chevalier*, 121 M 337, 193 P 2d 374, 377.

Where witness testified that he made the writing, that he signed it as a party there-

to and that he saw the other party sign it, and another witness testified as to the genuineness of such other party's signature, there was sufficient evidence to show execution and make the writing admissible in evidence. *Cottingham v. Doyle*, 122 M 301, 202 P 2d 533.

93-1101-14. (10591) Evidence of handwriting.**Cross-Reference**

See annotation to section 93-1101-12. *Betor v. Chevalier*, 121 M 337, 193 P 2d 374, 377.

CHAPTER 1301—EVIDENCE—INDIRECT—INFERENCES AND PRESUMPTIONS

93-1301-1. (10600) Indirect evidence classified.**Inference on Inference**

One inference cannot be drawn from any other inference or presumption. *Monforton v. Northern Pacific Ry. Co.*, — M —, 355 P 2d 501, 511.

References

Cited in *Olson v. McLean*, 132 M 111, 313 P 2d 1039, 1042.

93-1301-2. (10601) Inference defined.**Instructions**

An instruction containing an abstract statement of the statutory law as set out in this section and sections 93-1301-3, 93-1301-4 is not error when the facts are few and simple. *Gobel v. Rinio*, 122 M 235, 200 P 2d 700, 705.

In an action for damages resulting from negligence in driving automobile an instruction touching upon the usual propensities or passions of man when there was no evidence touching on such subject, was harmless, if error. *Gobel v. Rinio*, 122 M 235, 200 P 2d 700, 705.

show a previous condition, the foundation must show that the substance was in the same state or condition at a time not too remote, and that the nature of the substance is constant. *Richardson v. Farmers Union Oil Co.*, 131 M 535, 312 P 2d 134, 139.

References

Cited or applied in *Trenouth v. Mulroney*, 124 M 499, 227 P 2d 590, 595.

Admissibility of evidence as to financial condition of debtor on issue as to payment of debt. 9 ALR 2d 205.

Operation and Effect

If an inference is to be permitted to

93-1301-3. (10602) Presumption defined.**Cross-Reference**

See notes to sec. 93-1301-2. *Gobel v. Rinio*, 122 M 235, 200 P 2d 700, 705.

Operation and Effect

Where the defendant motor fuel carrier, while delivering gasoline to a filling station allowed some gas to escape, and as a result of such escape the gas was ignited and a fire resulted which destroyed the filling station, the doctrine of *res ipsa loquitur* can be relied upon by the plaintiff for damages resulting from the destruction of his filling station. *Harding v. H. F. Johnson, Inc.*, 126 M 70, 244 P 2d 111.

No presumption is to be inferred from the fact that a condition exists at a particular time that it existed in the past, since presumptions cannot be reversed and they do not operate backwards. *Richardson v. Farmers Union Oil Co.*, 131 M 535, 312 P 2d 134, 139, 145.

References

Cited in *Dial v. Dial*, 131 M 310, 310 P 2d 610, 613 (dissenting opinion); *Olson v. McLean*, 132 M 111, 313 P 2d 1039, 1042.

Conveyance of lot with reference to map or plat as creating presumption of right in nonabutting indicated streets, alleys or areas. 7 ALR 2d 607.

93-1301-4. (10603) When an inference arises.**Cross-Reference**

See notes to sec. 93-1301-2. *Gobel v. Rinio*, 122 M 235, 200 P 2d 700, 705.

Operation and Effect

This statute makes no distinction between "a fact legally proved" by direct evidence and "a fact legally proved" by circumstantial evidence. A fact, although arrived at by indirect or circumstantial evidence, may serve as a basis for an inference. *Fegles Const. Co. v. McLaughlin Const. Co.*, 205 F 2d 637, 639.

The presumption of the continued existence of a person, a personal relation, or a state of things is prospective, and not retrospective, and the law does not presume, from proof of the existence of present conditions or facts, that the same facts or conditions had existed for any length of time previously. *Richardson v. Farmers Union Oil Co.*, 131 M 535, 312 P 2d 134.

References

Cited or applied in *Trenouth v. Mulroney*, 124 M 499, 227 P 2d 590, 595.

93-1301-5. (10604) Presumptions may be controverted, when.**Operation and Effect**

Unless a presumption is controverted by other evidence, it is binding on the court. *Dial v. Dial*, 131 M 310, 310 P 2d 610, 612.

A statutory disputable presumption is satisfactory if uncontradicted, and must be followed if uncontroverted. *State v. Rice*, 134 M 265, 329 P 2d 451, 455.

Whether sworn testimony to the contrary is sufficient to rebut a statutory pre-

sumption is a question for the triers of fact to determine, except where the facts proved are overwhelmingly against the presumed facts and permit of but one rational and reasonable conclusion. *State v. Rice*, 134 M 265, 329 P 2d 451, 455.

Overcoming presumption of owner's consent to operation of automobile by another. 5 ALR 2d 196.

93-1301-6. (10605) Specification of conclusive presumptions.**Subd. 3****Operation and Effect**

Equitable estoppel will prevent a contractor from asserting a lien preference for an amount over the contract price against the first mortgagee where the contractor made representation as to the total price of the work to the mortgagee and knew that the loan would not have been granted had it been for a greater amount. *McGaffick v. Leigland*, 130 M 332, 303 P 2d 247.

This section is a declaration of the doctrine of equitable estoppel. *Hustad v. Reed*, 133 M 211, 321 P 2d 1083, 1090.

Where executors made an advance payment out of their personal funds to the legatee of a cash bequest, they were not estopped from asserting a debt due from the legatee, as against a judgment creditor of the legatee, even though the petition for distribution and final account showed no legacy advancements had been made. *Hustad v. Reed*, 133 M 211, 321 P 2d 1083, 1090.

Statements not Creating Estoppel

Where lessee of property with option to purchase sued for specific performance he could not be estopped from exercising his option by testimony of statements made by

lessee to lessor and prospective purchaser of property from lessor, prior to time for exercise of option, that he did not intend to purchase the property if he could get certain other property he had in mind. *Fiers v. Jacobson*, 123 M 242, 211 P 2d 968, 973.

In action by church members to set aside a deed executed by certain persons purporting to act as trustees, they could not be estopped by statements by one of their number proposing that the church property be sold. *Smith v. St. John Baptist Church*, 123 M 264, 211 P 2d 975, 978.

Subd. 4

Operation and Effect

Where land was purchased by defendant and leased to plaintiff, plaintiff should not be permitted to claim that the purchase price of the land constituted a loan from defendant to plaintiff and that deed was made to defendant as security for the loan and therefore defendant held the land in trust for plaintiff. *Laas v. All Persons*, 121 M 43, 189 P 2d 670 (concurring opinion).

93-1301-7. (10606) All other presumptions may be controverted. * * *

40. [Repealed.]

Repeal

Paragraph 40 of this section was repealed by Sec. 9, Ch. 20, L. 1951 (the Uniform Simultaneous Death Act compiled as secs. 91-423 to 91-430).

Subd. 3

Operation and Effect

A person instituting a criminal proceeding for passing a fraudulent check intends to vex, annoy and injure such person within the meaning of the word malice in section 19-103. *Rickman v. Safeway Stores, Inc.*, 124 M 451, 227 P 2d 607, 610.

Evidence was undisputed that defendant, charged with assault in first degree, shot the victim twice, critically wounding him. The repeated shooting into the vital parts of the body of a live human being with a deadly weapon is evidence that the gun was used intentionally and deliberately, and demonstrates the intent to kill. With this fact established the law presumes that the defendant was sane at the time he committed the act; that defendant committed the unlawful act with an unlawful intent, and that defendant intended the ordinary consequences of his voluntary act. These are rebuttable presumptions. *State v. McLeod*, 131 M 478, 311 P 2d 400, 406, 407.

Subd. 6

Operation and Effect

A decree of distribution does not concern itself with whether a legacy has been paid, acquired by third parties or is subject to a lien and the decree is not the final order of the court on the point of payment in the closing of an estate, but that is the office of the decree of final discharge under section 91-3906. *Hustad v. Reed*, 133 M 211, 321 P 2d 1083, 1092.

Operation and Effect

A judgment or final order in an action or proceeding is not evidence, conclusive or otherwise, of matters that were not involved in the proceeding and not determined. *Hustad v. Reed*, 133 M 211, 321 P 2d 1083, 1091.

References

Cited in *In re Minder's Estate*, 128 M 1, 270 P 2d 404, 414, 45 ALR 2d 898; *Gaffney v. Industrial Accident Board of Montana*, 129 M 394, 287 P 2d 256, 258; *Flom v. Unknown Heirs of Conrad*, 132 M 574, 319 P 2d 499, 503; *In re Hardy's Estate*, 133 M 536, 326 P 2d 692.

Subd. 4

Operation and effect

Truck driver could not recover damages from railroad where passenger train plainly visible from the truck crossed the highway and collided with the truck when it started to cross the railroad track. *Monforton v. Northern Pacific Ry. Co.*, — M —, 355 P 2d 501, 506.

Subd. 9

Certificate of Title

In action by administratrix to recover amount of automobile purchase loan made by decedent to defendant, it was a question for the jury whether title certificate was first surrendered as evidence of a pledge and then returned as evidence of payment. *Olson v. McLean*, 132 M 111, 313 P 2d 1039, 1042.

Subd. 15

Acts of an Official

The law presumes that the commissioner of agriculture performed his official duty as required by section 3-218 and that the form of warehouse receipt used and issued by plaintiff is in the form prescribed by law and the rules and regulations of the commissioner of agriculture of which law and official acts this court may take judicial notice. *Northern Montana Mus-*

tard Growers Co-op. v. Britton, 128 M 553, 280 P 2d 1078, 1085.

Subd. 25

Operation and Effect

Where a defendant was charged with a prior conviction of a felony there must be some evidence aside from the judgment itself that the person who stood convicted by the prior judgments of conviction was the defendant in the instant case. State v. Nelson, 130 M 466, 304 P 2d 1110.

References

Cited or applied in *Whitney v. Northwest Greyhound Lines*, 125 M 528, 242 P 2d 257, 264, 266 (dissenting opinion); *Lehfeldt v. Adams*, 130 M 395, 303 P 2d 934, at 936; *Shipman v. Todd*, 131 M 365, 310 P 2d 300, 303 (dissenting opinion); *Burke v. South Phillips County Co-Operative State Grazing District*, 135 M 209, 339 P 2d 491, 496; *Friedt v. Industrial Accident Board*, — M —, 345 P 2d 377, 379.

Presumption with respect to succession or estate taxes affecting estates by entirety and other joint estates. 1 ALR 2d 1146.

Presumption and burden of proof as to nonrevocation of lost will. 3 ALR 2d 952, 957.

Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile. 5 ALR 2d 196.

Relationship between party and witnesses as giving rise to or affecting presumption for inference from failure to produce or examine witness. 5 ALR 2d 893.

Presumption as to value of corporate stock or bonds. 6 ALR 2d 189.

Presumption of gratuity as to services rendered by member of household or family other than spouse without express agreement for compensation. 7 ALR 2d 8.

Presumption of negligence of carrier in leaving open door through which passenger steps or falls. 7 ALR 2d 1427.

Presumptions as to unadjudged incompetency which prevents running of statute of limitations. 9 ALR 2d 967.

Presumptions and inferences as to power of president of corporation to have litigation instituted by it, where express authorization by board of directors is not shown. 10 ALR 2d 710-713.

Proof of death from injury from external and violent means as supporting presumption or inference of death by accidental means within policy of insurance. 12 ALR 2d 1264.

Presumptions and burden of proof of evidence where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water. 13 ALR 2d 681.

Presumption as to validity of second marriage. 14 ALR 2d 7.

Presumptions concerning damages in action for personal injury resulting in death of infant. 14 ALR 2d 514.

Presumption of undue influence in non-testamentary gift to clergyman, spiritual adviser, or church. 14 ALR 2d 653.

Presumption as to what would be to child's best interest in case involving non-resident's right to custody of child. 15 ALR 2d 463.

Presumption of foreign naturalization for expatriation purposes. 15 ALR 2d 572.

CHAPTER 1401—EVIDENCE—INDISPENSABLE—UNWRITTEN AGREEMENTS—CONCLUSIVE—UNANSWERABLE

93-1401-3. (10609) Will to be in writing.

Operation and Effect

A power of attorney to a physician to perform all medical services for decedent for which he was to receive \$2,000, any portion of such amount unpaid on her

death to be paid by her executor, was invalid unless executed in compliance with this section. *Trenouth v. Mulroney*, 124 M 499, 227 P 2d 590, 597.

93-1401-5. (10611) Transfer of real property to be in writing.

Parol Evidence

Where quitclaim deed was typewritten on printed form which contained lines for the signatures and the acknowledgment but the paper showed no evidence that any name had ever been signed thereto or any notary's seal attached, it could not be shown by parol evidence that the deed

was actually signed. *Miller v. Miller*, 121 M 55, 190 P 2d 72, 75.

References

Cited in *Hankins v. Waitt*, 120 M 596, 189 P 2d 666; *Fiers v. Jacobson*, 123 M 242, 211 P 2d 968, 970; *Cleveland-Arvin v. Cleveland*, 123 M 463, 215 P 2d 963.

93-1401-7. (10613) Agreement not in writing—when invalid.**Memorandum**

An endorsed bank check with the additional words "payment land" written on it is insufficient to constitute the written "note or memorandum" required by the statutes for it does not contain all the essentials of the agreement. *Lewis v. Peterson*, 127 M 474, 267 P 2d 127, 128.

"Party Charged"

The "party to be charged" means the party to be charged in the particular suit. *Johnson v. Elliot*, 123 M 597, 218 P 2d 703, 707.

Presumption of Writing

The law will presume that a contract was in writing in the absence of any statement to the contrary. *Johnson v. Elliot*, 123 M 597, 218 P 2d 703, 706.

Sale of Ranch

In action for specific performance of contract for purchase of ranch of defendants, writings were sufficient to take the case out of the statute of frauds where instrument giving broker exclusive right for 30 days to sell ranch for \$30,000, provided that defendants were to pay broker a \$1,000 commission, recited that terms of sale were cash to defendants, possession should be taken by purchaser on named date and that defendants, who retained a 5% royalty, agreed to pay 1953 taxes and transfer all lease land to purchaser, who accepted unqualifiedly in writing accompanied by check as a down payment. *Ward v. Mattuschek*, 134 M 307, 330 P 2d 971.

Sufficiency of Complaint

Where complaint shows on its face that memorandum of agreement does not contain all essentials of agreement and such essentials cannot be ascertained without resort to oral evidence, demurrer to complaint was properly sustained. *Dineen v. Sullivan*, 123 M 195, 213 P 2d 241.

Although a contract to be valid must be in writing, that fact is a matter of proof and need not be alleged in the pleading. *Johnson v. Elliot*, 123 M 597, 218 P 2d 703, 706.

Sufficiency of Memorandum

The memorandum must contain all the essentials of the contract but if the material elements are stated in general terms all the details or particulars need not be stated. *Johnson v. Elliot*, 123 M 597, 218 P 2d 703, 707.

The note or memorandum necessary to meet the requirements of this section may consist of several writings, and it is sufficient if it contains all the essentials of the contract, although they are stated in general terms. *Hughes v. Melby*, 135 M 415, 340 P 2d 511.

References

Cited or applied in *Hankins v. Waitt*, 120 M 596, 189 P 2d 666; *Herman v. Herman*, 123 M 39, 207 P 2d 1155, 1157.

Sale of contractual rights; defect in written record as ground for avoiding sale. 10 ALR 2d 728.

CHAPTER 1501—EVIDENCE—PRODUCTION OF—SUBPOENAS**93-1501-1. (10616) Evidence to be produced, by whom.****Operation and Effect**

Where a plaintiff may be aided by a permissive inference as prima facie support of her contention, her opponent need do no more than counter-balance such permissive inference or prima facie case; he is not required to overbalance or outweigh it and when the whole of the evidence upon the issue involved leaves the case in equipoise, the one affirming on whom rests the burden must lose. *Whitney v. Northwest Greyhound Lines*, 125 M 528, 242 P 2d 257, 264, 265 (dissenting opinion).

Under this section the party asserting a right in any case has the burden of proving each of the material allegations of his cause of action. *McDonald v. Peters*, 128 M 241, 272 P 2d 730, 731.

Partition suit, burden of proof as re-

gards alleged prior voluntary partition of property. 1 ALR 2d 473.

Burden of proof with respect to succession or estate taxes affecting estates by entirety and other joint estates. 1 ALR 2d 1146.

Burden of proof as to change of beneficiary of national service life insurance. 2 ALR 2d 509.

Burden of proof as to nonrevocation of lost will. 3 ALR 2d 952, 957.

Burden of proof as to reasonableness of amount of funeral expenses. 4 ALR 2d 1021.

Burden of proof as to unadjudged incompetency which prevents running of statute of limitations. 9 ALR 2d 967.

Burden of proof as to exception in insurance policy as to loss or damage caused by dishonesty of employee. 12 ALR 2d 236.

Burden of proving actual damage from conversion or loss of, or damage to, personal property having no market value. 12 ALR 2d 909.

Burden of proof where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water. 13 ALR 2d 681.

Burden of proof as to cause in life, accident, or health policy excluding or limiting liability in case of insured's use of intoxicants or narcotics. 13 ALR 2d 1013.

Burden of proof in unemployment com-

pensation cases involving leaving employment or unavailability for particular job or duties, because of sickness or disability. 14 ALR 2d 1311.

Burden of proof as to what would be to child's best interest in case involving nonresident's right to custody of child. 15 ALR 2d 463.

Burden of proof or justification in action against landowner for killing or injuring trespassing dog. 15 ALR 2d 578.

Burden of proof in action against owner or bailor of horse for injuries by horse to hirer or bailee thereof. 15 ALR 2d 1331.

93-1501-3. (10618) Subpoena for witness defined.

References

Cited or applied in State ex rel. Wood-

ard v. District Court, 120 M 585, 189 P 2d 998, 1001.

93-1501-5. (10620) Repealed.

Repeal

This section (Sec. 382, p. 212, L. 1867; Sec. 456, p. 127, L. 1871; Sec. 635, p. 205, L. 1877), relating to service of subpoenas,

was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-8(c).

93-1501-7. (10622) Repealed.

Repeal

This section (Sec. 380, p. 212, L. 1867; Sec. 633, p. 204, L. 1877; amd. Sec. 1, Ch. 113, L. 1949), relating to when a witness

is not compelled to attend pursuant to subpoena, was repealed by Sec. 1, Ch. 154, Laws 1959.

93-1501-8. (10623) Person present compelled to testify.

Form, particularity, and manner of designation required in subpoena duces

tecum for production of corporate books, records, and documents. 23 ALR 2d 862.

CHAPTER 1701—EVIDENCE—AFFIDAVITS

93-1701-1. (10636) Affidavits—for what purposes may be used.

Child Custody Proceedings

In proceedings to modify child custody orders, defendant, a divorced father properly filed a verified answer controverting

the mother's affidavit on which citation for hearing was issued. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 229.

93-1701-6. (10641) If made in a foreign country, before whom taken.

Foreign Notaries

Federal district court properly considered affidavits executed before notaries in foreign countries in determining motion to dismiss for improper service of process

under sections 53-201 to 53-206 although such affidavits did not comply with this section. Bucholz v. Hutton, 153 F Supp 62, 66.

CHAPTER 1801—EVIDENCE—DEPOSITIONS, HOW TAKEN WITHIN AND WITHOUT THE STATE

(Repealed—Section 84, Chapter 13, Laws of 1961)

93-1801-1. (10643) Repealed.

Repeal

This section (Sec. 3340, C. Civ. Proc. 1895), relating to requirement of deposi-

tion, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-1.

93-1801-2, 93-1801-3. (10644, 10645) Repealed.**Repeal**

These sections (Secs. 403, 407, pp. 216, 217, L. 1867; Sec. 9, p. 76, L. 1870; Secs. 656, 660, pp. 209, 211, L. 1877), relating to grounds for taking of depositions, were

repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-1(a), (b) and (d) (3).

93-1801-4. (10646) Repealed.**Repeal**

This section (Sec. 408, p. 217, L. 1867; Sec. 1, p. 49, L. 1874; Sec. 661, p. 211, L. 1877; Sec. 1, p. 49, L. 1883; Sec. 1, Ch. 9, L. 1953), was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2705-1(b), 93-2705-3(a) and (b), 93-2705-4, and 93-2705-5(a).

As amended in 1953, this section read as follows: "The deposition of a witness out of this state may be taken upon the commission issued from the court, under the seal of the court, upon an order of the court, or a judge thereof, on the application of either party, upon five [5] days' previous notice to the other. If issued to any place within the United States, it may

be directed to any person agreed upon by the parties, or if they do not agree, to any judge or justice of the peace, or commissioner, or notary public, selected by the court or judge issuing it. If issued to any country out of the United States, it may be directed to a minister, ambassador, consul, vice-consul, or consular agent of the United States in such country, or to any person agreed upon by the parties."

References

Cited or applied in *Schuster v. Northern Co.*, 127 M 39, 257 P 2d 249, 253.

Admissibility of deposition of child of tender years. 30 ALR 2d 771.

93-1801-5 to 93-1801-7. (10647 to 10649) Repealed.**Repeal**

These sections (Secs. 409 to 411, p. 217, L. 1867), relating to proceedings on depositions by out of state witnesses, were repealed by Sec. 84, Ch. 13, Laws 1961, ef-

fective January 1, 1962. For new provisions, see secs. 93-2705-4, 93-2705-5(e) and (f)(1), 93-2705-6(b) and (d), and 93-2705-7(c)(3).

93-1801-8. (10650) Repealed.**Repeal**

This section (Sec. 3354, C. Civ. Proc. 1895), relating to parties entitled to use depositions, was repealed by Sec. 84, Ch.

13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-1(d) (2).

93-1801-9, 93-1801-10. (10651, 10652) Repealed.**Repeal**

These sections (Secs. 404, 405, p. 216, L. 1867; Secs. 657, 658, pp. 209, 210, L. 1877; Sec. 1, Ch. 34, L. 1933; Sec. 1, Ch. 92, L. 1945), relating to depositions for use within the state, were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see secs. 93-2705-1(c), (d)(3) and (e), 93-2705-3(a), 93-2705-4, 93-2705-5(a), (c) and (f)(1), and 93-2705-7(c).

proper item of cost. *Vandenbergh v. Allied Van Lines, Inc.*, — M —, 351 P 2d 537, 543.

Time for Objections

Where a deposition is taken pursuant to the statutes, unless otherwise provided by stipulation of the parties at the time of taking the original deposition, no objection will be permitted by the trial court, unless objections were interposed at the time the deposition was taken. *Williams v. Kearns*, — M —, 353 P 2d 748, 751.

Costs

Cost of copies of depositions are not a

93-1801-11. (10653) Repealed.**Repeal**

This section (Sec. 3362, C. Civ. Proc. 1895), relating to grounds for exclusion of depositions, was repealed by Sec. 84, Ch.

13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-5(e) and 93-2705-7(a) and (b).

93-1801-12. (10654) Repealed.**Repeal**

This section (Sec. 406, p. 217, L. 1867; Sec. 659, p. 211, L. 1877), relating to the time when a deposition may be used, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-1(d)(5).

Operation and Effect

Where a plaintiff offers a deposition in evidence, he is not bound by such evidence in the sense that he may not offer evidence that conflicts with it and have all the evidence considered by the jury. *McCollum v. O'Neil*, 128 M 584, 281 P 2d 493, 496.

93-1801-13 to 93-1801-16. (10655 to 10658) Repealed.**Repeal**

These sections (Secs. 3364 to 3367, C. Civ. Proc. 1895), relating to depositions taken in Montana for use in other states,

were repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-3(d).

CHAPTER 1901—EVIDENCE—GENERAL RULES OF EXAMINATION**93-1901-2. (10660) Witness not under examination may be excluded.****Discretion of Court**

The matter of excluding witnesses rests in the discretion of the trial court and the supreme court will not disturb the action of the trial court in the absence of a showing of prejudice. *Smith v. Armstrong*, 121 M 377, 198 P 2d 795, 799.

Where no prejudice is shown, the judge's refusal to exclude will not be disturbed on appeal. *State v. McLeod*, 131 M 478, 311 P 2d 400, 408.

Exempting Some Witnesses From Requirements

It is not mandatory that the motion be granted in its entirety. It is discretionary with the court to exempt some witnesses from the operation of the exclusion rule. It was not an abuse of discretion where the prosecuting witness was paralyzed and needed the personal attention of his wife. *State v. Cockrell*, 131 M 254, 309 P 2d 316, 321.

Felony Cases

Customary and universal rule of exclusion of witnesses should be applied in all felony cases, when proper and timely request, supported by particular and well founded reasons, is made. *State v. McLeod*, 131 M 478, 311 P 2d 400, 409.

Witness Influencing Another

Defendant was not prejudiced by court's refusal of his motion for exclusion of witnesses where the state's witnesses each testified as individuals and some of the state's witnesses even disputed each other on some of the vital facts in the case. This demonstrated that there was no evidence of any witness being under the influence of any other witness. *State v. McLeod*, 131 M 478, 311 P 2d 400, 409.

References

Cited or applied in *Feely v. Lacey*, 133 M 283, 322 P 2d 1104, 1110.

93-1901-3. (10661) Court may control mode of interrogation.**Limitation of Re-examination**

Where re-direct examination did not elicit any new matters court did not err in denying the defendant an opportunity for re-cross-examination. *State v. McSloy*, 127 M 265, 261 P 2d 663, 666.

Operation and Effect

Under this section and section 93-401-25, the trial court may control the cross-examination of witnesses. *State v. Keller*, 126 M 142, 246 P 2d 817, 819.

93-1901-7. (10665) Cross-examination, as to what.**Cross-examination as to Matters Stricken from the Records**

There is no merit to the defendant's contention that she was unduly restricted in the cross-examination of a witness when she was not permitted to examine the witness as to what he had testified to in the morning because it was ordered stricken from the record. The defendant was permitted to examine the defendant as to

what occurred during the trip which was what the morning examination of the witness had been about. *State v. Robuck*, 126 M 302, 248 P 2d 817.

Extent of Cross-Examination

In a prosecution for assault where the complaining witness had testified as to the circumstances and occurrences of the night assault, excluding cross-examination

as to whether she had, on the night in question, told the police who had assaulted her and also whether she had described her assailant, was improper. *State v. Carns*, — M —, 345 P 2d 735.

In cross-examination of a state's witness in a prosecution for committing an infamous crime against nature, the defendant should have been allowed to bring out the fact that the witness was being held by the state on the same or a different criminal charge, that the witness was subject to prosecution by the same prosecutor who was proceeding against the defendant and defendant should have been allowed to inquire of the witness as to whether promises, inducements or threats had been made to him by the authorities. *State v. Pontier*, — M —, 346 P 2d 974.

93-1901-8. (10666) Party producing witness, how far may impeach, etc.

Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution. 20 ALR 2d 1421.

93-1901-9. Repealed.

Repeal

This section (Sec. 1, Ch. 180, L. 1943), relating to testimony by a party called as a witness by an adverse party, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2706-6(b).

Answers on Interrupted Direct Examination

Where the defendant's counsel interrupts the direct examination of the plaintiff by his counsel before its completion and proceeds to question the plaintiff at great length with the court's permission, the defendant is bound by the answers elicited by his counsel and he may not

Operation and Effect

Where the matter of the absence of influence by members of the defendant's family was brought out by the defense upon cross-examination, the state then had the privilege to make inquiry into the subject of influence by members of the family. *State v. London*, 131 M 410, 310 P 2d 571, 583.

Cross-examination of witness in criminal case as to whether, and with whom, he has talked about or discussed the facts of the case. 35 ALR 2d 1045.

Right to examine witness as to his place of residence. 37 ALR 2d 737.

thereafter have them stricken from the record, even though they were inadmissible as hearsay. *Welch v. Nepstad*, 135 M 65, 337 P 2d 14.

Not Applicable in Criminal Proceeding

In a criminal case the state of Montana is the opposite party to the defendant, and the adverse witness statute is not applicable to a criminal proceeding. *State v. Moorman*, 133 M 148, 321 P 2d 236, 238.

References

Cited or applied in *McGaffick v. Leigland*, 130 M 332, 303 P 2d 247, 260; *Purcell v. Gibbs*, 133 M 481, 326 P 2d 679.

93-1901-10. (10667) Witness, how examined—when re-examined.

Limitation of Re-examination

Where re-direct examination did not elicit any new matters court did not err in denying the defendant an opportunity for re-cross-examination. *State v. McSloy*, 127 M 265, 261 P 2d 663, 666.

New Matter

After defendant on cross-examination had placed in the record an affidavit and letter that contradicted the testimony of the prosecuting witness on direct, it was not error to admit evidence of bribery on redirect since the state could properly explain the affidavit and letter as new material. *State v. Board*, 135 M 139, 337 P 2d 924.

93-1901-11. (10668) How impeached.

Improper Method of Impeachment

Defendant was deprived of a substan-

tial right, the right to object to questions and answers which were collateral, imma-

terial and prejudicial, when a fourteen page document was introduced and accepted in evidence over defendant's objection, which document contained some matters which were collateral, immaterial and prejudicial although some of the statements were proper impeaching evidence. By accepting the entire document, the defendant was prevented from excluding immaterial and collateral matters. *State v. Deeds*, 126 M 38, 243 P 2d 314.

Particular Wrongful Acts Not Admissible

In a prosecution for rape, evidence tending to show that the defendant had committed rape upon another woman at some prior time was inadmissible as tending to establish a systematic scheme or plan, or connecting the defendant with the crime charged. Such evidence only tended to show bad character and disposition and if the defendant introduced no evidence of his good reputation, such evidence is clearly inadmissible. *State v. Sauter*, 125 M 109, 232 P 2d 731, 733.

Prejudicial and Incompetent Questions

Where the county attorney continually asked one of defendant's character witnesses about how many times he had been in jail in different counties it was not proper questioning and it cannot be said that a defendant has had a fair and impartial trial where the prosecutor continually asks the defendant or his wit-

nesses prejudicial and incompetent questions. *State v. Toner*, 127 M 283, 263 P 2d 971, 975.

Proper Method to Impeach

Where a defendant takes the stand and upon cross-examination admits his prior convictions, the purpose of the statute was served, weakening his credibility as a witness. To go further and introduce the judgment showing such prior convictions serves no good purpose and it is prejudicial error to admit it. *State v. Colloff*, 125 M 31, 231 P 2d 343, 344.

Violation of Rule is Invasion of Substantial Right

Violation of this rule is an invasion of a substantial right, and where, in the cross-examination of a mother charged with murder for failure to feed her child, questions were asked involving the death of another child, the prosecution's statements that the questions were to test her credibility, and to prove that she knew that insufficient food would result in child's death were not acceptable and the error was not waived by efforts of defendant's counsel to explain the matter on redirect. *State v. Rivers*, 133 M 129, 320 P 2d 1004, 1007.

References

Cited or applied in *State v. Quinlan*, 126 M 52, 244 P 2d 1058, 1063 (dissenting opinion).

93-1901-12. (10669) Same—by evidence of declarations.

Testimony in Juvenile Court may be Used for Impeachment of Juvenile as a Witness

Section 10-611, which prohibits the "disposition of a child or any evidence given in the juvenile court being used as evidence against the child in any other case or proceeding," applies only when the child is a party to a later proceeding. Prior contradictory statements made in

the juvenile court may be admitted when the juvenile is a witness in a later proceeding for the purpose of impeachment. *State v. Searle*, 125 M 467, 239 P 2d 995, 997, 998.

References

Cited in *State v. Board*, 135 M 139, 337 P 2d 924, 928.

93-1901-13. (10670) Evidence of good character—when allowed.

Action for Slander

In action for slander where complaint alleged that manager of drug store stopped plaintiff in front of store and "maliciously intending to injure the good name and character of plaintiff" accused her of stealing an article from the store and that "by means of said defamatory words the plaintiff has been greatly injured in her good name and character" and answer was general denial and affirmative defense

containing defendant's allegations of what had taken place, there was no issue raised of plaintiff's character so as to permit plaintiff to introduce evidence of her honesty and integrity. *Meinecke v. Skaggs*, 123 M 308, 213 P 2d 237.

Military record or discharge from army or navy as evidence to show character or reputation. 9 ALR 2d 606.

CHAPTER 20—EVIDENCE, EFFECT OF

93-2001-1. (10672) Jury judges of effect of evidence, etc.**Subd. 2**Operation in General

In deciding the facts of a case the trial judge could accept "the direct evidence of one witness who is entitled to full credit" to prove any fact and the trial judge was not bound to decide the facts in conformity with the declarations of any number of witnesses, who did not produce conviction in his mind, against a less number, or against a presumption or other evidence satisfying his mind. *Davis v. Burton*, 128 M 434, 278 P 2d 213, 218.

Whether sworn testimony to the contrary is sufficient to rebut a statutory presumption is a question for the triers of fact to determine, except where the facts proved are overwhelmingly against the presumed facts and permit of but one rational and reasonable conclusion. *State v. Rice*, 134 M 265, 329 P 2d 451, 455.

Subd. 3All Parts of Testimony Not Necessarily Rejected

Although court was satisfied that testimony on one point was deliberately false, it would only furnish grounds for distrusting other parts of the witness's testimony and would not necessarily call for a rejection of all of it. *Sanders v. Sanders*, 124 M 595, 229 P 2d 164, 166, explained in 353 P 2d 328; 354 P 2d 183.

In separate maintenance action by wife where evidence on most points was in sharp conflict, if the court thought some of plaintiff's story incredible the most it could have done was to treat the rest of her testimony with distrust, the court was not bound to disregard all of her testimony. *Reynolds v. Reynolds*, 132 M 303, 317 P 2d 856, 858.

Subd. 4Admissibility of Accomplice's Testimony

An accomplice is treated as any other witness, except that his credibility may be affected by the fact that he is charged with the same offense as the person against whom he testifies; the testimony which tends to connect the defendant with the commission of the offense is admissible, but its weight is for the jury. *State v. Harmon*, 135 M 227, 340 P 2d 128.

Instructions Based on This Subdivision

Where the defense requested instructions as to the effect of accomplice's testimony and there was evidence in the record from which the jury might have concluded that a deputy sheriff was an accomplice of the defendant, the court should have instructed the jury that if they believed the deputy sheriff was an accomplice then they must weigh his evidence as provided by this section and that such evidence must be corroborated as required by section 94-7220. *State v. Porter*, 125 M 503, 242 P 2d 984, 990.

Subd. 5Burden of Proof

In an action to cancel and terminate a lease, the burden was on the plaintiffs to prove, by a preponderance of the evidence, that the defendants had violated the lease as charged in the complaint. *Davis v. Burton*, 128 M 434, 278 P 2d 213, 218.

Subd. 7Operation in General

In an action to quiet title and establish a boundary, and the plaintiff and the defendant each had a survey made but the defendant did not produce any evidence of his survey the court was justified in finding the survey as made by the plaintiff correct. *Reel v. Walter*, 131 M 382, 309 P 2d 1027, 1030.

References

Cited in *Wood v. Jaeger*, 128 M 235, 272 P 2d 725, 727; *McDonald v. Peters*, 128 M 241, 272 P 2d 730, 731; In re *Vincent's Estate*, 133 M 424, 324 P 2d 403, 410; *Deich v. Deich*, — M —, 323 P 2d 35, 42.

Propriety of instruction mentioning or suggesting specific sum as damages in death action. 2 ALR 2d 454.

Modern view as to propriety and correctness of instructions referable to maxim "falsus in uno, falsus in omnibus." 4 ALR 2d 1077.

Propriety of instructions in will contest defining natural objects of testator's bounty. 11 ALR 2d 731.

Instruction requiring or permitting consideration of changes in cost of living or in purchasing power of money in fixing damages. 12 ALR 2d 611.

CHAPTER 2101—EVIDENCE—WITNESSES—RIGHTS AND DUTIES

93-2101-3. (10675) Right of witnesses to protection.**Depositions**

Under order to perpetuate testimony by taking depositions, it is not proper for attorney to request that witness have books,

papers and accounts which might throw light on the facts expected to be proved. State ex rel. Woodard v. District Court, 120 M 585, 189 P 2d 998, 1000.

CHAPTER 2201—EVIDENCE—RULES IN PARTICULAR CASES

93-2201-1. (10680) An offer equivalent to tender.**References**

Cited in Continental Oil Co. v. McNair Realty Co., — M —, 353 P 2d 100, 110.

93-2201-3. (10682) Objections to tender must be specified.**Inadequate Tender**

Where the makers of a renewal note tendered an amount in payment which did not include a disputed attorney's fee, failure to include the fee in the tender rendered it ineffective to discharge the mortgage lien. Jensen v. Franklin, 135 M 341, 340 P 2d 832.

erty, tender could not be objected to where it was evident that defendants would not have conveyed property no matter what was done in the way of a tender and no objection was made to the tender at the time it was made. Fiers v. Jacobson, 123 M 242, 211 P 2d 968, 974, distinguished in 318 P 2d 257.

When Tender Unnecessary

In action for specific performance by lessee having option to purchase real prop-

References

Cited in Continental Oil Co. v. McNair Realty Co., — M —, 353 P 2d 100, 110.

93-2201-5. (10684) Compromise offer of no avail.**Evidence Inadmissible**

Evidence of compromise negotiations should not be admitted. Gamble-Skogmo, Inc. v. McNair Realty Co., 98 F Supp 440.

Operation and Effect

An "offer to do equity" in the answer when not accepted can not be used in evidence nor can it be regarded as an admission that defendants had waived any of their defenses. Rachou v. McQuitty, 125 M 1, 229 P 2d 965, 970.

CHAPTER 2301—EVIDENCE—PROCEEDINGS TO PERPETUATE TESTIMONY

(Repealed—Section 84, Chapter 13, Laws of 1961)

93-2301-1. (10686) Repealed.**Repeal**

This section (Sec. 412, p. 218, L. 1867; Sec. 664, p. 212, L. 1877), relating to perpetuation of the testimony of a witness, was repealed by Sec. 84, Ch. 13, Laws of 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-2(a).

the supreme court for a writ of certiorari. State ex rel. Woodard v. District Court, 120 M 585, 189 P 2d 998, 1001; State ex rel. Lichte v. District Court, 121 M 34, 189 P 2d 1004, 1008.

Purpose**Objection to Order**

Where order of court on application to perpetuate testimony was complained of the remedy was to apply to the court to vacate or modify the order under section 93-8405 and not by direct application to

An application under this statute must be made in good faith for the purpose of obtaining, preserving and using material testimony. State ex rel. Woodard v. District Court, 120 M 585, 189 P 2d 998, 1000.

93-2301-2. (10687) Repealed.**Repeal**

This section (Sec. 413, p. 218, L. 1867;

Sec. 665, p. 212, L. 1877), relating to the contents of an application to perpetuate

testimony, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-2(a).

Issue to be Shown

Where a deposition is to be taken an issue should be tendered by the affidavit, application or complaint, sufficiently definite to disclose that the testimony sought is relevant and pertinent to the framed or proposed issue. *State ex rel. Woodard*

v. District Court, 120 M 585, 189 P 2d 998, 1001.

Request for Papers

Under order to perpetuate testimony by taking depositions, it is not proper for attorney to request that witness have books, papers and accounts which might throw light on the facts expected to be proved. *State ex rel. Woodard v. District Court*, 120 M 585, 189 P 2d 998, 1000.

93-2301-3. (10688) Repealed.

Repeal

This section (Sec. 666, p. 213, L. 1877), relating to the appointment of a person to take testimony, was repealed by Sec. 84,

Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-2(a).

93-2301-4. (10689) Repealed.

Repeal

This section (Sec. 667, p. 213, L. 1877), relating to the taking of a deposition to perpetuate testimony, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-2(a).

Production of Records

Where no subpoena duces tecum has been issued witness named in application for perpetuation of testimony cannot be compelled to bring before the magistrate the records, books and papers. *State ex rel. Woodard v. District Court*, 120 M 585, 189 P 2d 998, 1001.

93-2301-5. (10690) Repealed.

Repeal

This section (Sec. 668, p. 214, L. 1877), making judicial papers prima facie evidence of the facts stated therein, was re-

pealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-2(a).

93-2301-6. (10691) Repealed.

Repeal

This section (Sec. 417, p. 219, L. 1867; Sec. 669, p. 214, L. 1877), relating to bases for the use of depositions, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-2(a).

sought for use at a contemplated trial in the event that such person at that time would be unable to give testimony, and in fact the petition shows that it is for the purpose of ascertaining the financial capabilities of the party, it should be denied. *State ex rel. Neilson v. District Court*, 128 M 445, 277 P 2d 536, 539. (Dissenting opinion, 128 M 445, 277 P 2d 536, 540.)

Operation and Effect

Deposition may only be taken where the application therefor is made in good faith for the purpose of obtaining, preserving and using material testimony. *State ex rel. Neilson v. District Court*, 128 M 445, 277 P 2d 536, 539. (Dissenting opinion, 128 M 445, 277 P 2d 536, 540.)

Privilege Against Self Incrimination

Where petition for deposition alleges facts which show that the person whose testimony is desired could be charged with a felony; to compel the person to so testify would be a violation of sec. 18, Art. III of the Constitution. *State ex rel. Neilson v. District Court*, 128 M 445, 277 P 2d 536, 539. (Dissenting opinion, 128 M 445, 277 P 2d 536, 540.)

Petition for Deposition

Where a petition for the taking of a deposition is barren of any allegation that it is sought for the purpose of perpetuating his testimony or that it is

in evidence, was repealed by Sec. 84, Ch. 13, Laws 1961, effective January 1, 1962. For new provisions, see sec. 93-2705-2(a).

93-2301-7. (10692) Repealed.

Repeal

This section (Sec. 670, p. 214, L. 1877), relating to the effect of depositions read

CHAPTER 2501—QUESTIONS OF FACT AND LAW—DECISION OF

93-2501-1. (10698) Questions of fact to be decided by the jury, etc.

References

Cited in *Wood v. Jaeger*, 128 M 235, 272 P 2d 725, 727; *McDonald v. Peters*, 128 M 241, 272 P 2d 730, 731.

Increase of risk for manufacture or sale of intoxicating liquor as question of fact. 2 ALR 2d 1163.

Contributory negligence failing to comply with statute regulating travel by pedestrian along highway as question for the jury. 4 ALR 2d 1258.

Question for jury as to liability of

building or construction contractor for injury or damage to third person occurring after completion and acceptance of the work. 13 ALR 2d 191.

Question for court or jury as to clause in life, accident, or health policy excluding or limiting liability in case of insured's use of intoxicants or narcotics. 13 ALR 2d 1014.

Shipper's intent to ratify carrier's unauthorized delivery or misdelivery as question of law or fact. 15 ALR 2d 812.

93-2501-2. (10699) Questions of law addressed to the court.

Doing Business in State

The determination whether plaintiff was doing business in Montana within the purview of section 15-1701 or was carrying on the business of a real estate broker within the purview of section 66-1903, were questions of law under this section. *Union Interechange, Inc. v. Parker*, — M —, 357 P 2d 339, 343.

Judicial Notice

The jury, as part of the court, may take notice of the general geography of Mon-

tana and of the boundaries and limits of the various political subdivisions of the state. *State v. Williams*, 122 M 279, 202 P 2d 245, 246.

Operation and Effect

Where the court took judicial notice that vodka was an intoxicating liquor the court was correct in instructing the jury that the drink known as "vodka squirt" and "vodka collins" are intoxicating liquors. *State v. Wild*, 130 M 476, 305 P 2d 325, 334.

CHAPTER 2601—UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

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- 93-2601-29. Additional duty of the court of this state when acting as an initiating state.
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- 93-2601-37. Registry of foreign support orders.
- 93-2601-38. Petition for registration.
- 93-2601-39. Jurisdiction and procedure.
- 93-2601-40. Effect and enforcement.

93-2601-1. Short title. This act may be cited as the "Uniform Reciprocal Enforcement of Support Act."

History: En. Sec. 1, Ch. 208, L. 1961.

Title of Act

An act adopting and inserting as a new chapter 2601 in title 93, Revised Codes of Montana, 1947, The Uniform Reciprocal Enforcement of Support Act as amended by the National Conference of Commissioners on Uniform State Laws in 1958; providing additional remedies for enforcement of duties of support; providing for criminal enforcement by extradition; providing for civil enforcement where parties reside in different states or in different counties of Montana; providing for registration and enforcement of foreign

support orders and support orders issued in different counties of Montana; and repealing sections 1 through 18 of chapter 222, Laws of 1951, codified as chapter 901, sections 94-901-1 through 94-901-18, 1959 Cumulative Pocket Supplement to Volume 8, Revised Codes of Montana, 1947, and repealing all acts and parts of acts in conflict herewith and providing an effective date.

Compiler's Note

Sections 93-2601-1 to 93-2601-6 comprise Subchapter I of this chapter, as enacted by Ch. 208, Laws 1961, entitled "General Provisions."

93-2601-2. Purposes. The purposes of this act are to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-3. Uniformity of interpretation. This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-4. Definitions. In this act unless the context otherwise requires:

(a) "State" includes any state, territory or possession of the United States and the District of Columbia in which this or a substantially similar reciprocal law has been enacted.

(b) "Initiating state" means any state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced.

(c) "Responding state" means any state in which any proceeding pursuant to the proceeding in the initiating state is or may be commenced.

(d) "Court" means the district court of any judicial district of this state and when the context requires, means the court of any other state as defined in a substantially similar reciprocal law.

(e) "Law" includes both common and statute law.

(f) "Duty of support" includes any duty of support imposed or imposed by law, or by any court order, decree or judgment, whether inter-

locutory or final, whether incidental to a proceeding for divorce, judicial separation, separate maintenance or otherwise.

(g) "Obligor" means any person owing a duty of support.

(h) "Obligee" means any person to whom a duty of support is owed and a state or political subdivision thereof.

(i) "Governor" includes any person performing the functions of governor or the executive authority of any territory covered by the provisions of this act.

(j) "Support order" means any judgment, decree or order of support whether temporary or final, whether subject to modification, revocation or remission regardless of the kind of action in which it is entered.

(k) "Rendering state" means any state in which a support order is originally entered.

(l) "Registering court" means any court of this state in which the support order of the rendering state is registered.

(m) "Register" means to record in the registry of foreign support orders as required by the court.

(n) "Certification" shall be in accordance with the laws of the certifying state.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-5. Remedies additional to those now existing. The remedies herein provided are in addition to and not in substitution for any other remedies.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-6. Extent of duties of support. Duties of support arising under the law of this state, when applicable under section 93-2601-9, bind the obligor, present in this state, regardless of the presence or residence of the obligee.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-7. Interstate rendition. The governor of this state (1) may demand from the governor of any other state the surrender of any person found in such other state who is charged in this state with the crime of failing to provide for the support of any person in this state and (2) may surrender on demand by the governor of any other state any person found in this state who is charged in such other state with the crime of failing to provide for the support of any person in such other state. The provisions for extradition of criminals not inconsistent herewith shall apply to any such demand although the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he had not fled therefrom. Neither the demand, the oath, nor any proceedings for extradition pursuant to this action need state or show that the person whose surrender is demanded has fled from justice, or at the time of the commission of the crime was in the demanding or other state.

History: En. Sec. 1, Ch. 208, L. 1961.

Compiler's Note

Sections 93-2601-7 and 93-2601-8 com-

prise Subchapter II of this chapter, as enacted by Ch. 208, Laws 1961 entitled "Criminal Enforcement."

93-2601-8. Conditions of interstate rendition. (a) Before making the demand on the governor of any other state for the surrender of a person charged in this state with the crime of failing to provide for the support of any person, the governor of this state may require any county attorney of this state to satisfy him that at least sixty (60) days prior thereto the obligee brought an action for the support under this act, or that the bringing of an action would be of no avail.

(b) When under this or a substantially similar act, a demand is made upon the governor of this state by the governor of another state for the surrender of a person charged in the other state with the crime of failing to provide support, the governor may call upon any county attorney to investigate or assist in investigating the demand, and to report to him whether any action for support has been brought under this act or would be effective.

(c) If an action for the support would be effective and no action has been brought, the governor may delay honoring the demand for a reasonable time to permit prosecution of an action for support.

(d) If an action for support has been brought and the person demanded has prevailed in that action, the governor may decline to honor the demand.

(e) If an action for support has been brought and pursuant thereto the person demanded is subject to a support order, the governor may decline to honor the demand so long as the person demanded is complying with the support order.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-9. Choice of law. Duties of support applicable under this act are those imposed or imposable under the laws of any state where the obligor was present during the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

History: En. Sec. 1, Ch. 208, L. 1961.

Compiler's Note

Sections 93-2601-9 to 93-2601-33 com-

prise Subchapter III of this chapter as enacted by Ch. 208, Laws 1961 entitled "Civil Enforcement."

93-2601-10. Remedies of a state or political subdivision thereof furnishing support. Whenever the state or a political subdivision thereof furnishes support to an obligee, it has the same right to invoke the provisions hereof as the obligee to whom the support was furnished for the purpose of securing reimbursement of expenditures so made and of obtaining continuing support.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-11. How duties of support are enforced. All duties of support, including arrearages, are enforceable by action irrespective of the relationship between the obligor and the obligee.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-12. Jurisdiction. Jurisdiction of all proceedings hereunder is vested in the district court.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-13. Contents of complaint for support. The complaint shall be verified and shall state the name and, so far as known to the plaintiff, the address and circumstances of the defendant and his dependents for whom support is sought and all other pertinent information. The plaintiff may include in or attach to the complaint any information which may help in locating or identifying the defendant such as a photograph of the defendant, a description of any distinguishing marks of his person, other names and aliases by which he has been or is known, the name of his employer, his finger prints, or social security number.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-14. Officials to represent plaintiff. When this state is acting as the responding state in any proceeding under this act, the county attorney, at the request of the court, shall represent the plaintiff. In any case where this state would be acting as the initiating state, the county attorney, at the request of the state department of public welfare or the county department of public welfare and on a showing of probable cause, shall initiate a proceeding and represent the plaintiff.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-15. Complaint for a minor. A complaint on behalf of a minor obligee may be brought by a person having legal custody of the minor without appointment as guardian ad litem.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-16. Duty of court of this state as initiating state. If the court of this state acting as an initiating state finds that the complaint sets forth facts from which it may be determined that the defendant owes a duty of support and that a court of the responding state may obtain jurisdiction of the defendant or his property, it shall so certify and shall cause three copies of (1) the complaint, (2) its certificate and (3) this act to be transmitted to the court in the responding state. If the name and address of such court is unknown and the responding state has an information agency comparable to that established in the initiating state it shall cause such copies to be transmitted to the state information agency or other proper official of the responding state, with a request that it forward them to the proper court, and that the court of the responding state acknowledge their receipt to the court of the initiating state.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-17. Costs and fees. No plaintiff shall be required to furnish any security. A plaintiff shall be required to pay the regular fee for commencing an action as set forth in section 25-232, Revised Codes of Montana, 1947, but shall be required to pay no other fee or costs unless a court of this state acting either as an initiating or responding state finds that the complaint was filed in bad faith. A court of this state acting either as an initiating or responding state may in its discretion direct that any part of or all fees and costs incurred in this state, including without limitation by enumeration, fees for filing, service of process, seizure of

property, and stenographic service of both plaintiff and defendant, or either, be paid by the obligor or the county.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-18. Jurisdiction by arrest. When the court of this state, acting either as an initiating or responding state, has reason to believe that the defendant may flee the jurisdiction it may:

(1) as an initiating state request in its certificate that the court of the responding state obtain the body of the defendant by appropriate process if that be permissible under the law of the responding state, or

(2) as a responding state, obtain the body of the defendant by appropriate process.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-19. State information agency. The state department of public welfare is hereby designated as the state information agency under this act, and it shall

(1) compile a list of the courts and their addresses in this state having jurisdiction under this act and transmit the same to the state information agency of every other state which has adopted this or a substantially similar act, and

(2) maintain a register of such lists received from other states and transmit copies thereof as soon as possible after receipt to every court in this state having jurisdiction under this act.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-20. Duty of the court and officials of this state as responding state. (a) After the court of this state acting as a responding state has received from the court of the initiating state the aforesaid copies the clerk of the court shall docket the cause and notify the county attorney of his action.

(b) It shall be the duty of the county attorney diligently to prosecute the case. He shall take all action necessary in accordance with the laws of this state to give the court jurisdiction of the defendant or his property and shall request the court to set a time and place for a hearing.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-21. Further duties of court and officials in the responding state. (a) The county attorney shall, on his own initiative, use all means at his disposal to trace the defendant or his property and if, due to inaccuracies of the complaint or otherwise, the court cannot obtain jurisdiction, the county attorney shall inform the court of what he has done and request the court to continue the case pending receipt of more accurate information or an amended complaint from the court in the initiating state.

(b) If the defendant or his property is not found in the county and the county attorney discovers by any means that the defendant or his property may be found in another county of this state or in another state he shall so inform the court and thereupon the clerk of the court shall forward the documents received from the court in the initiating state to a court

in the other county or to a court in the other state or to the information agency or other proper official of the other state with a request that it forward the documents to the proper court. Thereupon both the court of the other county and any court of this state receiving the documents and the county attorney have the same powers and duties under this act as if the documents had been originally addressed to them. When the clerk of a court of this state retransmits documents to another court, he shall notify forthwith the court from which the documents came.

(c) If the county attorney has no information as to the whereabouts of the obligor or his property he shall so inform the initiating court.

(d) If the defendant or his property is found in the county and the county attorney discovers that the duty of support is based on a support order issued by a court of another county of this state, he shall obtain from the court of the other county a certified copy of the support order and register it in the local court as provided in section 93-2601-34.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-22. Procedure. The court shall conduct proceedings under this act in the manner prescribed by law for an action for enforcement of the type of duty of support claimed.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-23. Hearing and determination. If the plaintiff is absent from the responding state and the defendant presents evidence which constitutes a defense, the court shall continue the case for further hearing and the submission of evidence by both parties.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-24. Evidence of husband and wife. Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this act. Husband and wife are competent witnesses and may be compelled to testify to any relevant matter, including marriage and parentage.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-25. Order of support. If the court of the responding state finds a duty of support, it may order the defendant to furnish support or reimbursement therefor and subject the property of the defendant to such order. The court and county attorney of any county where the obligor is present or has property have the same powers and duties to enforce the order as have those of the county where it was first issued. If enforcement is impossible or cannot be completed in the county where the order was issued, the county attorney shall transmit a certified copy of the order to the county attorney of any county where it appears that procedures to enforce payment of the amount due would be effective. The county attorney to whom the certified copy of the order is forwarded shall proceed with enforcement and report the results of the proceedings to the court first issuing the order.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-26. Responding state to transmit copies to initiating state. The court of this state when acting as a responding state shall cause to be transmitted to the court of the initiating state a copy of all orders of support or for reimbursement therefor.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-27. Additional powers of court. In addition to the foregoing powers, the court of this state when acting as the responding state has the power to subject the defendant to such terms and conditions as the court may deem proper to assure compliance with its orders and in particular

(a) To require the defendant to furnish recognizance in the form of a cash deposit or bond of such character and in such amount as the court may deem proper to assure payment of any amount required to be paid by the defendant.

(b) To require the defendant to make payments at specified intervals to the clerk of the court and to report personally to such clerk at such times as may be deemed necessary.

(c) To punish the defendant who shall violate any order of the court to the same extent as is provided by law for contempt of the court in any other suit or proceeding cognizable by the court.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-28. Additional duties of the court of this state when acting as a responding state. The court of this state when acting as a responding state shall have the following duties which may be carried out through the clerk of the court:

(a) Upon the receipt of a payment made by the defendant pursuant to any order of the court or otherwise, to transmit the same forthwith to the court of the initiating state, and

(b) Upon request, to furnish to the court of the initiating state a certified statement of all payments made by the defendant.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-29. Additional duty of the court of this state when acting as an initiating state. The court of this state when acting as an initiating state shall have the duty which may be carried out through the clerk of the court to receive and disburse forthwith all payments made by the defendant or transmitted by the court of the responding state.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-30. Proceedings not to be stayed. No proceeding under this act shall be stayed because of the existence of a pending action for divorce, separation, annulment, dissolution, habeas corpus or custody proceeding.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-31. Application of payments. No order of support issued by a court of this state when acting as a responding state shall supersede any other order of support but the amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-32. Effect of participation in proceeding. Participation in any proceeding under this act shall not confer upon any court of jurisdiction of any of the parties thereto in any other proceeding.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-33. Inter-county application. This act is applicable when both the plaintiff and the defendant are in this state but in different counties. If the court of the county in which the complaint is filed finds that the complaint sets forth facts from which it may be determined that the defendant owes a duty of support and finds that a court of another county in this state may obtain jurisdiction of the defendant or his property, the clerk of the court shall send three copies of the complaint and a certification of the findings to the court of the county in which the defendant or his property is found. The clerk of the court of the county receiving these copies shall notify the county attorney of their receipt. The county attorney and the court in the county to which the copies are forwarded shall then have duties corresponding to those imposed upon them when acting for the state as a responding state.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-34. Support orders issued in different counties of this state. Any support order issued by a court of this state may be registered in any other court of this state by filing in such other court a certified copy thereof, and such order when so registered shall have the same effect and may be enforced as if originally entered in the court in which so registered, including the power to punish for contempt.

History: En. Sec. 1, Ch. 208, L. 1961.

Compiler's Note

Sections 93-2601-34 to 93-2601-40 com-

prise Subchapter IV of this chapter as enacted by Ch. 208, Laws 1961 entitled "Registration of Support Orders."

93-2601-35. Foreign support orders. If the duty of support is based on a foreign support order, the obligee has the additional remedies provided in the following sections.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-36. Registration. The obligee may register the foreign support order in a court of this state in the manner, with the effect and for the purposes herein provided.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-37. Registry of foreign support orders. The clerk of the court shall maintain a registry of foreign support orders in which he shall record foreign support orders.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-38. Petition for registration. The petition for registration shall be verified and shall set forth the amount remaining unpaid and a list of any other states in which the support order is registered and shall have attached to it a certified copy of the support order with all modifica-

tions thereof. The foreign support order is registered upon the filing of the petition subject only to subsequent order of confirmation.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-39. Jurisdiction and procedure. The procedure to obtain jurisdiction of the person or property of the obligor shall be as provided in civil cases. The obligor may assert any defense available to a defendant in an action on a foreign judgment. If the obligor defaults, the court shall enter an order confirming the registered support order and determining the amounts remaining unpaid. If the obligor appears and a hearing is held, the court shall adjudicate the issues including the amounts remaining unpaid.

History: En. Sec. 1, Ch. 208, L. 1961.

93-2601-40. Effect and enforcement. The support order as confirmed shall have the same effect and may be enforced as if originally entered in the court of this state. The procedures for the enforcement thereof shall be as in civil cases, including the power to punish the defendant for contempt as in the case of other orders for payment of alimony, maintenance or support entered in this state.

History: En. Sec. 1, Ch. 208, L. 1961.

Separability Clause

Section 2 of Ch. 208, Laws 1961 read "Severability. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

Repealing Clause

Section 3 of Ch. 208, Laws 1961 read

"Repealer. Sections 1 through 18 of Chapter 222, Laws of 1951, codified as chapter 901, sections 94-901-1 through 94-901-18, 1959 cumulative pocket supplement to Volume 8, Revised Codes of Montana, 1947, and all other acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

Effective Date

Section 4 of Ch. 208, Laws 1961 read "Time of taking effect. This act shall be in full force and effect from and after its passage and approval." Approved March 7, 1961.

CHAPTER 2701—SCOPE OF RULES—ONE FORM OF ACTION

Section 93-2701-1. Scope of rules.

93-2701-2. One form of action.

93-2701-1. (Rule 1) Scope of rules. These rules govern the procedure in the district courts of the state of Montana in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81 [93-2711-7]; provided, however, that the discovery procedures set forth in Rules 26 through 37 [93-2705-1 through 93-2705-12], inclusive, shall be applicable to proceedings in probate. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

History: En. Sec. 1, Ch. 13, L. 1961.

Title of Act

An act providing for the codification and general revision of the laws relating to rules of pleading, practice and procedure in civil cases in the courts of the state of Montana for the purpose of sim-

plifying judicial proceedings and promoting the speedy determination of litigation upon its merits; providing for an effective date of this act; repealing the following sections of the Revised Codes of Montana, 1947: Section 93-2303; section 93-2801; section 93-2805; section 93-2811; section 93-2812; section 93-2816; section 93-2818;

section 93-2821; section 93-2822; sections 93-2824 through 93-2826; section 93-2828; section 93-2905; section 93-3003; section 93-3006; section 93-3007; sections 93-3013 through 93-3015; section 93-3017; section 93-3018; sections 93-3101 through 93-3103; sections 93-3201 through 93-3203; sections 93-3301 through 93-3306; section 93-3401; section 93-3402; section 93-3404; section 93-3405; section 93-3408; sections 93-3410 through 93-3412; section 93-3415; sections 93-3501 through 93-3506; sections 93-3601 through 93-3604; section 93-3701; sections 93-3801 through 93-3803; sections 93-3806 through 93-3808; sections 93-3811 through 93-3813; sections 93-3815 through 93-3819; section 93-3820 as amended by chapter 16, laws of 1953; sections 93-3901 through 93-3905; section 93-3907; section 93-3909; section 93-4120; section 93-4701; sections 93-4703 through 93-4705; section 93-4708; section 93-4709; section 93-4801; section 93-4902; section 93-4904; section 93-4905

as amended by chapter 84, laws of 1949; section 93-4906; section 93-4908; section 93-4909; sections 93-5012 through 93-5014; subsection (5) of section 93-5101; section 93-5111; section 93-5201; section 93-5202; section 93-5301; section 93-5303; sections 93-5401 through 93-5403; sections 93-5405 through 93-5407; sections 93-5410 through 93-5412; section 93-5502; section 93-5605; section 93-5701; section 93-5703; section 93-8007 as amended by chapter 75, laws of 1959; sections 93-8008 through 93-8010; section 93-8201; section 93-8301; section 93-8401; section 93-8403; sections 93-8501 through 93-8504; section 93-8507; section 93-8607; section 93-8705; section 93-1501-5; sections 93-1801-1 through 93-1801-3; section 93-1801-4 as amended by chapter 9, laws of 1953; sections 93-1801-5 through 93-1801-16; section 93-1901-9; sections 93-2301-1 through 93-2301-7; repealing all acts and parts of acts in conflict herewith.

93-2701-2. (Rule 2) One form of action. There shall be one form of action to be known as "Civil Action."

History: En. Sec. 2, Ch. 13, L. 1961.

CHAPTER 2702—COMMENCEMENT OF ACTION—SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Section 93-2702-1. Commencement of action.

93-2702-2. Persons subject to jurisdiction—process—service.

93-2702-3. Service and filing of pleadings and other papers.

93-2702-4. Time.

93-2702-1. (Rule 3) Commencement of action. A civil action is commenced by filing a complaint with the court.

History: En. Sec. 3, Ch. 13, L. 1961.

93-2702-2. (Rule 4) Persons subject to jurisdiction—process—service.
A. **DEFINITION OF PERSON.** As used in this rule [section], the word "person," whether or not a citizen or resident of this state and whether or not organized under the laws of this state, includes an individual whether operating in his own name or under a trade name; an individual's agent or personal representative; a corporation; a business trust; an estate; a trust; a partnership; an unincorporated association; and any two or more persons having a joint or common interest or any other legal or commercial entity.

B. [JURISDICTION OF PERSONS].

(1) **Subject to Jurisdiction.** All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing personally, through an employee, or through an agent, of any of the following acts:

(a) the transaction of any business within this state;

(b) the commission of any act which results in accrual within this state of a tort action;

(c) the ownership, use, or possession of any property, or of any interest therein, situated within this state;

(d) contracting to insure any person, property, or risk located within this state at the time of contracting;

(e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or

(f) acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within, this state, or as executor or administrator of any estate within this state.

(2) Acquisition of Jurisdiction. Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee.

C. PROCESS.

(1) Summons—Issuance. Upon the filing of the complaint, the clerk shall forthwith issue a summons, and shall deliver the summons either to the sheriff of the county in which the action is filed, or to the person who is to serve it, or upon request, to the attorney for said party who shall thereafter be responsible to see that the summons is served in the manner prescribed by these rules. Upon request, separate or additional summons shall issue against any parties designated in the original action, or against any additional parties who may be brought into the action.

(2) [Summons]—Form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

D. SERVICE.

(1) By Whom Served. Service of all process shall be made by a sheriff of the county where the party to be served is found, by his deputy, by a constable authorized by law, or by any other person over the age of 21 not a party to the action, except that a subpoena may be served as provided in Rule 45 [93-2706-8].

(2) Personal Service Within the State. The summons and complaint shall be served together, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(a) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by delivering a copy of the summons and of the

complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given.

(b) Upon a minor over the age of 14 years, by delivering a copy of the summons and complaint to him personally, and by leaving a copy thereof at his dwelling house or usual place of abode with some adult of suitable discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(c) Upon a minor under the age of 14 years, by delivering a copy of the summons and complaint to his guardian, if he has one within the state, and if not, then to his father or mother or other person or agency having his care or control, or with whom he resides, or if service cannot be made upon any of them, then as provided by order of the court.

(d) Upon a person who has been adjudged of unsound mind by a court of this state, or for whom a guardian has been appointed in this state by reason of incompetency, by delivering a copy of the summons and complaint to his guardian, if there be a guardian residing in this state appointed and acting under the laws of this state. If there be no such guardian, the court shall appoint a guardian ad litem for the incompetent person, with or without personal service on the incompetent, as the court may direct. When a party is alleged to be of unsound mind, but has not been so adjudged by a court of this state, such party may be brought into court by service of process personally upon him. The court may also stay any action pending against a person on learning that such person is of unsound mind.

(e) Upon a domestic corporation or upon a partnership or other unincorporated association, by delivering a copy of the summons and complaint to an officer, director, superintendent or managing or general agent, or partner, or associate, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If the sheriff shall make return that no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons and complaint at any office of the domestic corporation, partnership, or unincorporated association within this state with the person in charge of such office. If the suit is against a corporation whose charter or right to do business in the state has expired or been forfeited, by delivering a copy thereof to any one of the persons who have become trustees for the corporation and its stockholders or members, and if none such can be found, service may be made upon the secretary of state.

(f) Upon a foreign corporation, partnership or other unincorporated association, established by the laws of any other state or country, and having a place of business within this state or doing business herein either permanently or temporarily, or which was doing busi-

ness herein either permanently, or temporarily at the time the cause of action accrued, (i) by delivering a copy of the summons and complaint to an officer, director, superintendent or managing or general agent, or partner, or associate, or attorney for such corporation, partnership, or association; or by leaving such copies at the office or place of business of the corporation, partnership, or association within the state with the person in charge of such office; or (ii) by delivering a copy of the summons and complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, partnership, or association, provided that if the agent or attorney in fact is one designated by statute to receive service, such further notice as the statute requires shall also be given; or (iii) if the charter of the foreign corporation, or its right to do business, has expired or been forfeited, by delivering a copy of the summons and complaint to one of the persons who have become trustees for the corporation and its stockholders or members, if such can be found in Montana.

(g) Upon a city, village, town, school district, county, or public agency or board of any such public bodies, by delivering a copy of the summons and complaint to any commissioner, trustee, board member, mayor or head of the legislative department thereof.

(h) Upon the state, or any state board or state agency, by delivering a copy of the summons and complaint to the governor, or to any member of such state board or state agency, and also by delivering an additional copy of the summons and complaint to the attorney general.

(3) Personal Service Outside the State. Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and complaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state. Where service of summons by publication is permitted as hereinafter provided, personal service of the summons and complaint upon the defendant out of the state, made after the filing of the required complaint and required affidavit for publication, shall be equivalent to, and shall have the same force and effect as, the publication and mailing provided for hereafter in 5(d) and 5(e) of this rule [section].

(4) Other Service. Whenever a statute of this state or an order of the court made pursuant thereto provides for the service of a summons or of a notice or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute or order.

(5) Service by Publication—When Permitted—Effect—Manner—Proof.

(a) When Permitted. A defendant, whether known or unknown, who has not been served under the foregoing subsections of this rule [section] can be served by publication in the following situations only:

(i) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest,

actual or contingent, therein, or the relief demanded consist wholly or partially in excluding the defendant from any interest therein. This subsection shall apply whether any such defendant is known or unknown.

(ii) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real or personal property within this state.

(iii) When the action is for divorce or for annulment of marriage of a resident of this state or for modification of a decree of divorce granted by a court of this state.

(iv) When the defendant has property within this state which has been attached or has a debtor within this state, who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to jurisdiction acquired under subsection 5(a) (i), 5(a) (ii), and 5(a) (iii) herein.

(b) Effect of Service by Publication. When a defendant, whether known or unknown, has been served by publication as provided in this rule [section], any court of this state having jurisdiction may render a decree which will adjudicate any interest of such defendant in the status, property, or thing acted upon, but it may not bind the defendant personally to the personal jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

(c) Filing of Pleading and Affidavit for Service by Publication. Before service of the summons by publication is authorized in any case, there shall be filed with the clerk in the district court of the county in which the action is commenced (i) a pleading setting forth a claim in favor of the plaintiff and against the defendant in one of the situations defined in 5(a) above; and (ii) upon return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that such defendant resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons; or that the defendant, if a domestic or foreign corporation, has no agent for the service of process, nor managing nor business agent, cashier, secretary, or other officer who can, after due diligence, be found within the state; or, if the defendant is an unknown claimant, by showing that he has made diligent search and inquiry for all persons who claim, or might claim any right, title, estate, or interest in, or lien, or encumbrance upon, such property, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any right of dower, inchoate or accrued, and that he has specifically named as defendants in such action all such persons whose names can be ascertained. Such affidavit shall be sufficient evidence of the diligence of any inquiry made by the affiant, if the affidavit recite the fact that diligent inquiry was made, and it need not detail the facts constituting such inquiry.

(d) Number of Publications. Service of the summons by publication may be made by publishing the same three times, once each week

for three successive weeks, in a newspaper published in the county in which the action is pending, if a newspaper is published in such county, and if no newspaper is published in such county then in a newspaper published in an adjoining county and having a general circulation therein.

(e) Mailing Summons and Complaint. A copy of the summons for publication and complaint, at any time after the filing of the affidavit for publication and not later than 10 days after the first publication of the summons, shall be deposited in some post office in this state, postage prepaid, and directed to the defendant at his place of residence unless the affidavit for publication states that the residence of the defendant is unknown. If the defendant is a foreign corporation whose charter has not expired or been forfeited, and personal service cannot be effected within Montana under the provisions of this rule [section], copy of the summons for publication and complaint shall be mailed to (i) the manager of the office of the principal place of business of the corporation, or if none, to one of the officers or directors of such corporation; or (ii) to an agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of said corporation; or (iii) if none of the persons mentioned herein can be found, then to the last known address of the corporation at its principal home office, if known, and also to the secretary of state of the state of its incorporation. If the defendant is a foreign corporation whose charter or right to do business has expired or been forfeited, then copy of the summons for publication and complaint shall be mailed to one of the persons who have become trustees for the corporation and its stockholders or members, and, if none can be found, to the last known address of the corporation at its principal home office, if known, and also to the secretary of state of the state of its incorporation.

(f) Time When First Publication or Service Outside State Must Be Made. The first publication of the summons, or personal service of the summons and complaint upon the defendant out of the state, must be made within 60 days after the filing of the affidavit for publication. If not so made, the action shall be deemed dismissed as to any person not served within said 60 day period.

(g) When Service by Publication or Outside State Complete. Service by publication is complete upon the expiration of 20 days after the last publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, upon the expiration of 20 days after the date of such service.

(h) Additional Information to be Published. In addition to the form of summons prescribed above in "C. Process, (2) [Summons]-Form," the published summons shall state in general terms the nature of the action, and in all cases where publication of summons is made in an action in which the title to, or any interest in or lien upon real property is involved, or affected, or brought into question, the publication shall also contain a description of the real property involved, affected or brought into question thereby, and a statement of the object of the action.

(6) Service on Secretary of State. Unless otherwise provided by statute, whenever the secretary of state of the state of Montana has been appointed, or is deemed by law to have been appointed, as the agent to receive service of process for any person who cannot with due diligence be found or served personally within Montana, the party, or his attorney, shall make an affidavit stating the facts showing that the secretary of state is such agent, and stating the residence and last known post-office address of the person to be served, and shall file such affidavit with the clerk of the court in which such action is pending, accompanied by sufficient copies of such affidavit and of the summons and complaint for service upon the secretary of state, and the sum of three dollars to be paid to the secretary of state as a fee for the receipt of such service. The clerk shall forward three copies of the summons, complaint and affidavit, and the fee, to the sheriff of Lewis and Clark county for service on the secretary of state or his deputy by delivering thereto, and the sheriff shall make due return of such service.

Such service on the secretary of state shall be sufficient personal service upon the person to be served, provided that notice of such service and a copy of the summons and complaint are forthwith sent by registered or certified mail by the secretary of state to the party to be served at his last known address, marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said addressee, or the secretary of state shall be advised by the postal authority that delivery of said registered or certified mail was refused by said addressee. The date on which the secretary of state receives said return receipt, or advice by the postal authority that delivery of said registered or certified mail was refused, shall be deemed to be the date of service, and the court in which the action is pending may order such continuance as may be necessary to afford reasonable opportunity to defend the action. As an alternative to sending the notice and summons and complaint by registered or certified mail, as here provided, the secretary of state may cause notice of the service and a copy of the summons and complaint to be served by any qualified law enforcement officer, in accord with the procedure set out in D(1), (2) and (3) of this rule [section].

The secretary of state shall make an affidavit as to the service on him, and as to his mailing a copy of the summons and complaint and notice of such service, and as to the receipt of the return receipt or advice of the refusal of registered mail, and the respective dates thereof, and shall transmit such affidavit to the clerk of the court in which the action is pending, and it shall be filed in the cause. The secretary of state shall keep on file in his office a copy of the summons and complaint, and of his affidavit, and also keep a record which shall show the day and hour and manner of such service.

(7) Amendment. At any time, in its discretion, and upon such notice and terms as it deems just, the court may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued,

(8) **Proof of Service.** Proof of the service of the summons and of the complaint or notice, if any, accompanying the same must be as follows:

- (a) If served by the sheriff or other officer, his certificate thereof;
- (b) If any other person, his affidavit thereof;
- (c) In case of publication an affidavit of the publisher and an affidavit of the deposit of a copy of the summons and complaint in the post office as required by law, if the same shall have been deposited; or
- (d) The written admission of the defendant showing the time and place of service.

The certificate or affidavit of service mentioned in this subdivision must state the time, date, place, and manner of service.

(9) **Contents of Affidavit of Service.** Whenever a process, pleading, order of court, or other paper is served personally by a person other than the sheriff or person designated by law, the affidavit of service when made, shall state that the person so serving is of legal age, and the date and place of making the service. It also shall state that the person making such service knew the person served to be the person named in the papers served and the person intended to be served.

(10) **Procedure Where Only Part of Defendants Are Served.** If the summons is served on one or more, but not all, of the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom the process is served, and may at any time thereafter have a summons against the defendant not served with the first process to cause him to appear in said court to show cause why he should not be made a party to such judgment. Upon such defendant being duly served with such process, the court shall hear and determine the matter in the same manner as if such defendant had been originally brought into court, and such defendant shall also be allowed the benefit of any payment or satisfaction which may have been made on the judgment before recovered.

History: En. Sec. 4, Ch. 13, L. 1961.

see secs. 93-2816, 93-3003, 93-3006, 93-3007, 93-3013 to 93-3015, 93-3017, and 93-3018.

Cross-Reference

For prior law and annotations thereto,

93-2702-3. (Rule 5) Service and filing of pleadings and other papers.

(a) **SERVICE—WHEN REQUIRED.** Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4 [93-2702-2].

(b) **[SERVICE]—HOW MADE.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party

shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule [section] means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) [SERVICE]—NUMEROUS DEFENDANTS. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendant and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) FILING. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

(e) FILING WITH THE COURT DEFINED. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(f) PROOF OF SERVICE. Proof of service shall be made by an affidavit of the party or his attorney making service, or by the certificate of his resident attorney making service or by an acknowledgment in writing from the party or attorney served, and such affidavit, certificate or acknowledgment shall be filed within 10 days after service. Failure to make proof of service does not affect the validity of the service.

History: En. Sec. 5, Ch. 13, L. 1961.

see secs. 93-3819, 93-8501 to 93-8504, and 93-8507.

Cross-Reference

For prior law and annotations thereto,

93-2702-4. (Rule 6) Time. (a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) **ENLARGEMENT.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b) [93-2706-13(b), 93-2706-15(b), 93-2707-6 (b), (d) and (e), and 93-2707-7(b)], except to the extent and under the conditions stated in them.

(c) **UNAFFECTED BY EXPIRATION OF TERM.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) **FOR MOTIONS—AFFIDAVITS.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59(c) [93-2707-6(c)], opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) **ADDITIONAL TIME AFTER SERVICE BY MAIL.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

History: En. Sec. 6, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-3905, 93-8403, and 93-8504.

CHAPTER 2703—PLEADINGS AND MOTIONS

Section 93-2703-1.	Pleadings allowed—form of motions.
93-2703-2.	General rules of pleading.
93-2703-3.	Pleading special matters.
93-2703-4.	Form of pleadings.
93-2703-5.	Signing of pleadings.
93-2703-6.	Defenses and objections—when and how presented—by pleading or motion—motion for judgment on pleadings.
93-2703-7.	Counterclaim and cross-claim.
93-2703-8.	Third-party practice.
93-2703-9.	Amended and supplemental pleadings.
93-2703-10.	Pre-trial procedure—formulating issues.

93-2703-1. (Rule 7) Pleadings allowed—form of motions. (a) **PLEADINGS.** There shall be a complaint and an answer; and there shall be a

reply to a counterclaim denominated as such; and an answer to a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14 [93-2703-8]; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) **MOTIONS AND OTHER PAPERS.** (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) **DEMURRERS, PLEAS, ETC., ABOLISHED.** Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

History: En. Sec. 7, Ch. 13, L. 1961.

see secs. 93-3101 to 93-3103, 93-3201, 93-3301 to 93-3303, 93-3501 to 93-3506, 93-3601, 93-3603, 93-3604, 93-3907, 93-4902, and 93-8401.

Cross-Reference

For prior law and annotations thereto,

93-2703-2. (Rule 8) General rules of pleading. (a) **CLAIMS FOR RELIEF.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) **DEFENSES—FORM OF DENIALS.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11 [93-2703-5].

(c) **AFFIRMATIVE DEFENSES.** In pleading to a preceding pleading, a party shall set forth affirmative accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury

by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) **EFFECT OF FAILURE TO DENY.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) **PLEADING TO BE CONCISE AND DIRECT—CONSISTENCY.**
(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11 [93-2703-5].

(f) **CONSTRUCTION OF PLEADINGS.** All pleadings shall be so construed as to do substantial justice.

History: En. Sec. 8, Ch. 13, L. 1961.

see secs. 93-3202, 93-3401, 93-3410 to 93-3412, 93-3602, 93-3801, 93-3808, 93-3812, 93-3813, 93-3815 to 93-3817, 93-3909, and 93-4904.

Cross-Reference

For prior law and annotations thereto,

93-2703-3. (Rule 9) Pleading special matters. (a) CAPACITY. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) **FRAUD, MISTAKE, CONDITION OF THE MIND.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) **CONDITIONS PRECEDENT.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) **OFFICIAL DOCUMENT, ACT, ORDINANCE OR STATUTE.** In pleading an official document or official act it is sufficient to aver that the

document was issued or the act done in compliance with law. In pleading any ordinance or regulation of any county, city, village, or other political subdivision of this state, or any special, local or private statute, or any right derived therefrom, or the laws of another jurisdiction, it is sufficient to refer to the ordinance, regulation, statute or law by its title and the date of its passage, or by the appropriate designation in the official or recognized compilation thereof.

(e) **JUDGMENT.** In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) **TIME AND PLACE.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **SPECIAL DAMAGE.** When items of special damage are claimed, they shall be specifically stated.

History: En. Sec. 9, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-3301, 93-3505, 93-3806, 93-3807, and 93-3811.

93-2703-4. (Rule 10) Form of pleadings. (a) **CAPTION—NAMES OF PARTIES.** Every pleading shall contain a caption setting forth the name, district and county of the court, the title of the action, the number of the action, and a designation as in Rule 7(a) [93-2703-1(a)]. In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) **PARAGRAPHS—SEPARATE STATEMENTS.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **ADOPTION BY REFERENCE—EXHIBITS.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

History: En. Sec. 10, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-3202, 93-3410, 93-3602, and 93-3820.

93-2703-5. (Rule 11) Signing of pleadings. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings

need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule [section], it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule [section] an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

History: En. Sec. 11, Ch. 13, L. 1961.

Cross-Reference

For prior law, see sec. 93-3701.

93-2703-6. (Rule 12) Defenses and objections—when and how presented—by pleading or motion—motion for judgment on pleadings. (a) WHEN PRESENTED. Except as otherwise provided by statute applicable to particular defendants or proceedings, the responsive pleadings shall be served as follows: A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, or within 20 days after the completion of service of process as provided in Rule 4 [93-2702-2], unless the court directs otherwise when service of process is made pursuant to Rule 4D(4) [93-2702-2D(4)]. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order or such time as the order otherwise directs. Unless a different time is fixed by the court, when a motion permitted by these rules is served, the responsive pleading shall be served within 20 days after notice of the court's action if the court denies the motion or postpones its disposition until trial on the merits, and shall be served within 20 days after the service of the more definite statement if the court grants a motion for a more definite statement.

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as

provided in Rule 56 [93-2707-3], and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56 [93-2707-3].

(c) **MOTION FOR JUDGMENT ON THE PLEADINGS.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 [93-2707-3], and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56 [93-2707-3].

(d) **PRELIMINARY HEARINGS.** The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule [section], whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule [section] shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) **MOTION FOR MORE DEFINITE STATEMENT.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **MOTION TO STRIKE.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **CONSOLIDATION OF DEFENSES.** A party who makes a motion under this rule [section] may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule [section] and does not include therein all defenses and objections then available to him which this rule [section] permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule [section].

(h) **WAIVER OF DEFENSES.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defenses of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion

of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) [93-2703-9(b)] in the light of any evidence that may have been received.

History: En. Sec. 12, Ch. 13, L. 1961.

see secs. 93-2905, 93-3003, 93-3301, 93-3305, 93-3306, 93-3501, 93-3502, 93-3504 to 93-3506, 93-3604, 93-3802, 93-3803, and 93-4902.

Cross-Reference

For prior law and annotations thereto,

93-2703-7. (Rule 13) Counterclaim and cross-claim. (a) **COMPULSORY COUNTERCLAIMS.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

(b) **PERMISSIVE COUNTERCLAIMS.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) **COUNTERCLAIM EXCEEDING OPPOSING CLAIM.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) **COUNTERCLAIM AGAINST THE STATE.** These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the state of Montana or any of its governmental subdivisions, agencies or officers.

(e) **COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING.** A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) **OMITTED COUNTERCLAIM.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) **CROSS-CLAIM AGAINST CO-PARTY.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) **ADDITIONAL PARTIES MAY BE BROUGHT IN.** When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-

claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.

(i) **SEPARATE TRIALS—SEPARATE JUDGMENT.** If the court orders separate trials as provided in Rule 42(b) [93-2706-5(b)], judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) [93-2707-1(b)], even if the claims of the opposing party have been dismissed or otherwise disposed of.

History: En. Sec. 13, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-3402, 93-3404, 93-3405, 93-3408, 93-3415, and 93-5703.

93-2703-8. (Rule 14) Third-party practice. (a) **WHEN DEFENDANT MAY BRING IN THIRD PARTY.** At any time after commencement of the action a defendant as a third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against him. The person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 [93-2703-6] and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13 [93-2703-7]. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 [93-2703-6] and his counterclaims and cross-claims as provided in Rule 13 [93-2703-7]. Any party may move for severance, separate trial, or dismissal of the third-party claim; the court may direct a final judgment upon either the original claim or the third-party claim alone in accordance with the provisions of Rule 54(b) [93-2707-1(b)]. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) **WHEN PLAINTIFF MAY BRING IN THIRD PARTY.** When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule [section] would entitle a defendant to do so.

History: En. Sec. 14, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see sec. 93-3415.

93-2703-9. (Rule 15) Amended and supplemental pleadings. (a) **AMENDMENTS.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not

been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **AMENDMENTS TO CONFORM TO THE EVIDENCE.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) **RELATION BACK OF AMENDMENTS.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **SUPPLEMENTAL PLEADINGS.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

History: En. Sec. 15, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-2303, 93-3304, 93-3818, 93-3901 to 93-3905, and 93-3909.

93-2703-10. (Rule 16) Pre-trial procedure—formulating issues. In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibilities of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury action or to non-jury actions or extend it to all actions.

History: En. Sec. 16, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see sec. 93-4905 prior to the 1949 amendment thereof.

CHAPTER 2704—PARTIES

Section 93-2704-1.	Parties plaintiff and defendant—capacity.
93-2704-2.	Joinder of claims and remedies.
93-2704-3.	Necessary joinder of parties.
93-2704-4.	Permissive joinder of parties.
93-2704-5.	Misjoinder and non-joinder of parties.
93-2704-6.	Interpleader.
93-2704-7.	Class actions.
93-2704-8.	Intervention.
93-2704-9.	Substitution of parties.

93-2704-1. (Rule 17) Parties plaintiff and defendant—capacity (a) REAL PARTY IN INTEREST. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state of Montana so provides, an action for the use or benefit of another shall be brought in the name of the state of Montana.

(b) **CAPACITY TO SUE OR BE SUED.** The capacity of persons to sue or be sued shall be determined by appropriate statutory provisions.

(c) **INFANTS OR INCOMPETENT PERSONS.** Whenever an infant or incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person, or in any case where the court deems it expedient a guardian ad litem may be appointed to represent an infant or

incompetent person, even though the infant or incompetent person, may have a general guardian and may have appeared by him.

History: En. Sec. 17, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-2801 and 93-2805.

93-2704-2. (Rule 18) Joinder of claims and remedies. (a) **JOINDER OF CLAIMS.** The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternative claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 [93-2704-3, 93-2704-4, and 93-2704-6] are satisfied. There may be a like joinder or cross-claims or third-party claims if the requirements of Rules 13 and 14 [93-2703-7 and 93-2703-8] respectively are satisfied.

(b) **JOINDER OF REMEDIES—FRAUDULENT CONVEYANCES.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money. This rule [section] shall not be applied in tort cases so as to permit the joinder of a liability or indemnity insurance carrier, unless such carrier is by law or contract directly liable to the person injured or damaged.

History: En. Sec. 18, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see sec. 93-3203.

93-2704-3. (Rule 19) Necessary joinder of parties. (a) **NECESSARY JOINDER.** Subject to the provisions of Rule 23 [93-2704-7] and of subdivision (b) of this rule [section], persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) **EFFECT OF FAILURE TO JOIN.** When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to service of process, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to service of process can be acquired only by their consent or voluntary appearance; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) **[FAILURE TO JOIN]—NAMES OF OMITTED PERSONS AND REASONS FOR NON-JOINDER TO BE PLEADED.** In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded

between those already parties, but who are not joined, and shall state why they are omitted.

History: En. Sec. 19, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-2821 and 93-2828.

93-2704-4. (Rule 20) Permissive joinder of parties. (a) **PERMISSIVE JOINDER.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) **SEPARATE TRIALS.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

History: En. Sec. 20, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-2811, 93-2812, 93-2818, 93-2822, and 93-4906.

93-2704-5. (Rule 21) Misjoinder and non-joinder of parties. Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

History: En. Sec. 21, Ch. 13, L. 1961.

93-2704-6. (Rule 22) Interpleader. (a) **BY JOINDER, CROSS-CLAIM OR COUNTERCLAIM.** Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule [section] supplement and do not in any way limit the joinder or parties permitted in Rule 20 [93-2704-4].

(b) **BY SUBSTITUTION.** A defendant against whom an action is pending upon a contract, or for specific real or personal property, at any time before answer, upon affidavit that a person not a party to the action and without collusion with him makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, may apply to the court for an order to substitute such person in his place and to discharge him from liability to either party on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct, and the court, in its discretion, may make the order.

History: En. Sec. 22, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see sec. 93-2825.

93:2704-7. (Rule 23) Class actions. (a) **REPRESENTATION.** If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(b) **SECONDARY ACTION BY SHAREHOLDERS.** In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(c) **DISMISSAL OR COMPROMISE.** A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule [section] notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

(b) **ORDERS TO ENSURE ADEQUATE REPRESENTATION.** The court at any stage of an action under subdivision (a) of this rule [section] may impose such terms as shall fairly and adequately protect the interests of the persons on whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment or of any other proceedings in the action, including notice to come in and present

claims and defenses. When, notwithstanding such orders, the representation appears to the court inadequate fairly to protect the interests of absent parties, the court may, at any time prior to judgment, order an amendment of the pleadings, eliminating therefrom all reference to representation of the absent parties, and the court may order the entry of judgment in such form as to affect only the parties to the action and those adequately represented.

History: En. Sec. 23, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see sec. 93-2821.

93-2704-8. (Rule 24) Intervention. (a) **INTERVENTION OF RIGHT.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) **PERMISSIVE INTERVENTION.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **PROCEDURE.** A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. When the constitutionality of an act of the legislative assembly affecting the public interest is drawn in question in any action to which neither the state nor any agency or officer thereof is a party, the court shall notify the attorney general of the state and the attorney general may within 20 days thereafter intervene in the same manner on behalf of the state.

History: En. Sec. 24, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see secs. 93-2826 and 93-2828.

93-2704-9. (Rule 25) Substitution of parties. (a) **DEATH.** (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by

any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 [93-2702-3] and upon persons not parties in the manner provided in Rule 4 [93-2702-2] for the service of a summons, and may be served in any judicial district. If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(3) After a verdict is rendered or an order for judgment is made in any action, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action survives by law, and substitution of parties shall be allowed as in other cases.

(b) INCOMPETENCY. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule [section] may allow the action to be continued by or against his guardian or may appoint a guardian ad litem for that purpose.

(c) TRANSFER OF INTEREST. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule [section].

(d) SUBSTITUTION OF SUCCESSOR TO PUBLIC OFFICER. When an officer of the state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule [section] may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the constitution of the state. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. If substitution is not made within a reasonable time, the action may be dismissed as to such public officer. When an officer of the class described herein may sue or be sued in his official capacity, he may be described as a party by his official title and not by name, subject to the power of the court, upon motion or on its own initiative, to require his name to be added. Unless his name is so added, no formal order of substitution is necessary.

History: En. Sec. 25, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see sec. 93-2824.

CHAPTER 2705—DEPOSITIONS AND DISCOVERY

- Section 93-2705-1. Depositions pending action.
93-2705-2. Depositions before action or pending appeal.
93-2705-3. Persons before whom depositions may be taken.
93-2705-4. Stipulations regarding the taking of depositions.
93-2705-5. Depositions upon oral examination.
93-2705-6. Depositions of witnesses upon written interrogatories.
93-2705-7. Effect of errors and irregularities in depositions.
93-2705-8. Interrogatories to parties.
93-2705-9. Discovery and production of documents and things for inspection, copying or photographing.
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93-2705-1. (Rule 26) Depositions pending action. (a) **WHEN DEPOSITIONS MAY BE TAKEN.** Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After the commencement of the action and service of process on any defendant the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained, if notice of the taking is served by the plaintiff within 20 days after such service of process. The attendance of witnesses may be compelled by the use of subpoenas as provided in Rule 45 [93-2706-8]. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) **SCOPE OF EXAMINATION.** Unless otherwise ordered by the court as provided by Rule 30(b) or (d) [93-2705-5(b) or (d)], the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) **EXAMINATION AND CROSS-EXAMINATION.** Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43(b) [93-2706-6(b)].

(d) **USE OF DEPOSITIONS.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or

private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than one hundred (100) miles from the place of trial or hearing, or is out of the state of Montana, unless it appears that the absence of the witness has been procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

(5) Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States, the state of Montana or of any other state, has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) **OBJECTIONS TO ADMISSIBILITY.** Subject to the provisions of Rule 32(c) [93-2705-7(c)], objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of evidence if the witness were then present and testifying.

(f) **EFFECT OF TAKING OR USING DEPOSITIONS.** A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule [section]. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

History: En. Sec. 26, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-1801-2 to 93-1801-4, 93-1801-8, 93-1801-10, and 93-1801-12.

93-2705-2. (Rule 27) Depositions before action or pending appeal.

(a) **BEFORE ACTION.** (1) **Petition.** A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any district court of the state of Montana may

file a verified petition in the district court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a district court of the state of Montana but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for an order described in the petition. At least twenty (20) days before the date of hearing the notice shall be served in the manner provided in Rule 4 [93-2702-2], and for persons not personally served in the manner provided in Rule 4D [93-2702-2D], who do not appear, an attorney shall be appointed who shall represent them and cross-examine the deponent. If an expected adverse party is a minor or incompetent the provisions of Rule 17(c) [93-2704-1(c)] apply.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35 [93-2705-9 and 93-2705-10]. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules it may be used in any action involving the same subject matter subsequently brought in a district court of the state of Montana in accordance with the provisions of Rule 26(d) [93-2705-1(d)].

(b) PENDING APPEAL. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to

be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35 [93-2705-9 and 93-2705-10], and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) **PERPETUATION BY PETITION.** This rule [section] does not limit the power of a court to entertain a proceeding to perpetuate testimony.

History: En. Sec. 27, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-2301-1 to 93-2301-7.

93-2705-3. (Rule 28) Persons before whom depositions may be taken.

(a) **WITHIN THE UNITED STATES.** Within the state of Montana, depositions shall be taken before a person authorized by the laws of this state to administer oaths; without the state, but within the United States, or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before a person authorized to administer oaths by the laws of this state, the United States, or of the place where the examination is held; within or without the state of Montana, depositions may also be taken before a person appointed by the court in which the action is pending, which persons so appointed shall have the power to administer oaths and take testimony.

(b) **IN FOREIGN COUNTRIES.** In a foreign state or country depositions shall be taken (1) before a secretary of embassy or legation, consul, vice consul, or consular agent of the United States, or any officer authorized to administer oaths under the laws of this state, or of the United States or (2) before a person appointed by the court. The officer or person is empowered to administer oaths and take testimony. A commission shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title.

(c) **DISQUALIFICATION FOR INTEREST.** No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(d) **DEPOSITIONS TO BE USED IN OTHER STATES.** Whenever the deposition of any person is to be taken in this state pursuant to the laws of another state or the United States or of another country for use in proceedings there, the district court of the county where the witness is to be served, upon proof that notice has been duly served, may issue, pursuant to Rule 45(d) [93-2706-8(d)], the necessary subpoenas.

History: En. Sec. 28, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-1801-4, 93-1801-9, and 93-1801-13 to 93-1801-15.

93-2705-4. (Rule 29) Stipulations regarding the taking of depositions.

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

History: En. Sec. 29, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-1801-4, 93-1801-5, and 93-1801-10.

93-2705-5. (Rule 30) Depositions upon oral examination. (a) NOTICE OF EXAMINATION—TIME AND PLACE. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

(b) ORDERS FOR THE PROTECTION OF PARTIES AND DEPENDENTS. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(c) RECORD OF EXAMINATION—OATH—OBJECTIONS. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of any party or of the

deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or in the event that the deposition is being taken in an action pending in another state or country, the district court in the county where the deposition is being taken, may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(e) **SUBMISSION TO WITNESS—CHANGES—SIGNING.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32(d) [93-2705-7(d)] the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) **CERTIFICATION AND FILING BY OFFICERS—COPIES—NOTICE OF FILING.** (1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) Upon receipt of a deposition the clerk of court shall open it and file it in the open file unless otherwise ordered. When the deposition is filed the clerk of court shall promptly give notice thereof to all parties.

(g) **FAILURE TO ATTEND OR TO SERVE SUBPOENA—EXPENSES.** (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses

incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

History: En. Sec. 30, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-1801-4, 93-1801-6, and 93-1801-9 to 93-1801-11.

93-2705-6. (Rule 31) Depositions of witnesses upon written interrogatories. (a) **SERVING INTERROGATORIES—NOTICE.** A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

(b) **OFFICER TO TAKE RESPONSES AND PREPARE RECORD.** A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f) [93-2705-5(c), (e), and (f)], to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) **FILING AND NOTICE.** Upon receipt of a deposition the clerk of court shall open it and file it in the open file unless otherwise ordered. When the deposition is filed the clerk of court shall promptly give notice thereof to all parties.

(d) **ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS.** After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30 [93-2705-5] which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

History: En. Sec. 31, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-1801-5 and 93-1801-6.

93-2705-7. (Rule 32) Effect of errors and irregularities in depositions.

(a) **AS TO NOTICE.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) **AS TO DISQUALIFICATION OF OFFICER.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) **AS TO TAKING OF DEPOSITION.** (1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under Rule 31 [93-2705-6] are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.

(d) **AS TO COMPLETION AND RETURN OF DEPOSITION.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 [93-2705-5 and 93-2705-6] are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

History: En. Sec. 32, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-1801-5, 93-1801-10, and 93-1801-11.

93-2705-8. (Rule 33) Interrogatories to parties. Any party may serve upon any adverse party, who has been served with process or who has appeared, written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 20 days after the service of interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 20 days after service of interrogatories a

party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b) [93-2705-1(b)], and the answers may be used to the same extent as provided in Rule 26(d) [93-2705-1(d)] for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) [93-2705-5(b)] are applicable for the protection of the party from whom answers to interrogatories are sought under this rule [section].

History: En. Sec. 33, Ch. 13, L. 1961.

93-2705-9. (Rule 34) Discovery and production of documents and things for inspection, copying or photographing. Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b) [93-2705-5(b)], the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, or any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) [93-2705-1(b)] and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b) [93-2705-1(b)]. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

History: En. Sec. 34, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see sec. 93-8301.

93-2705-10. (Rule 35) Physical and mental examination of persons.
(a) **ORDER FOR EXAMINATION.** In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **REPORT OF FINDINGS.** (1) If requested by the person examined, the party causing the examination to be made shall deliver to him

a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report he shall be deemed to be in contempt of court.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition.

History: En. Sec. 35, Ch. 13, L. 1961.

93-2705-11. (Rule 36) Admission of facts and of genuineness of documents. (a) **REQUEST FOR ADMISSION.** After commencement of an action a party may serve upon any other party, who has been served with process or who has appeared, a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request, or of the truth of any relevant matters of fact set forth in the request. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 20 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

(b) **EFFECT OF ADMISSION.** Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

History: En. Sec. 36, Ch. 13, L. 1961.

93-2705-12. (Rule 37) Refusal to make discovery—consequences. (a) **REFUSAL TO ANSWER.** If a party or other deponent refuses to answer

any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in which the action is pending, or if the deposition is being taken for use in an action pending in another state or country to the district court in Montana where the deposition is being taken, for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 [93-2705-6] or upon the refusal of a party to answer any interrogatory submitted under Rule 33 [93-2705-8], the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. In an action pending in the state of Montana, if the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) **FAILURE TO COMPLY WITH ORDER.** (1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court so directing, the refusal may be considered a contempt of that court.

(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule [section] requiring him to answer designated questions, or an order made under Rule 34 [93-2705-9] to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 [93-2705-10] requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) **EXPENSES ON REFUSAL TO ADMIT.** If a party, after being served with a request under Rule 36 [93-2705-11] to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) **FAILURE OF PARTY TO ATTEND OR SERVE ANSWERS.** If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33 [93-2705-8], after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

History: En. Sec. 37, Ch. 13, L. 1961.

CHAPTER 2706—TRIALS

- Section 93-2706-1. Jury trial of right.
93-2706-2. Trial by jury or by the court.
93-2706-3. Assignment of cases for trial.
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93-2706-1. (Rule 38) Jury trial of right. (a) RIGHT RESERVED. The right of trial by jury as declared by the constitution of the state of Montana or as given by a statute of the state of Montana shall be preserved to the parties inviolate.

(b) **DEMAND.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) **[DEMAND]—SPECIFICATION OF ISSUES.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall

be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) **WAIVER.** The failure of a party to serve a demand as required by this rule [section] and to file it as required by Rule 5(d) [93-2702-3(d)] constitutes a waiver by him of trial by jury. A waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

• **History:** En. Sec. 38, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see sec. 93-5301.

93-2706-2. (Rule 39) Trial by jury or by the court. (a) BY JURY. When trial by jury has been demanded as provided in Rule 38 [93-2706-1], the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

(b) **BY THE COURT.** Issues not demanded for trial by jury as provided in Rule 38 [93-2706-1] shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court upon motion or of its own initiative may on ten days' notice to the parties order a trial by a jury of any or all issues.

(c) **ADVISORY JURY AND TRIAL BY CONSENT.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

History: En. Sec. 39, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see secs. 93-4905 and 93-5301.

93-2706-3. (Rule 40) Assignment of cases for trial. The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deem expedient. Precedence shall be given to actions entitled thereto by any statute of the state of Montana.

History: En. Sec. 40, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see secs. 93-4908 and 93-4909.

93-2706-4. (Rule 41) Dismissal of actions. (a) VOLUNTARY DISMISSAL—EFFECT THEREOF. (1) By Plaintiff—By Stipulation. Subject to the provisions of Rule 23(c) [93-2704-7(c)], of Rule 66 [93-2708-3], and of any statute of the state of Montana, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule [section], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) INVOLUNTARY DISMISSAL—EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a) [93-2706-15(a)]. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule [section], other than a dismissal for lack of jurisdiction or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM. The provisions of this rule [section] apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule [section] shall be made before a responsive pleading is served, or, if there is none, before the introduction of evidence at the trial or hearing.

(d) COSTS OF PREVIOUSLY-DISMISSED ACTION. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

History: En. Sec. 41, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-4705 and 93-4708.

93-2706-5. (Rule 42) Consolidation—separate trials. (a) **CONSOLIDATION.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **SEPARATE TRIALS.** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

History: En. Sec. 42, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-4906 and 93-8705.

93-2706-6. (Rule 43) Evidence. (b) **SCOPE OF EXAMINATION AND CROSS-EXAMINATION.** A party may interrogate any unwilling or hostile witness by leading questions. Either party, if he shall call as a witness in his behalf, the opposite party, an employee or agent of the opposite party, or an officer, director, employee or agent of a public or private corporation, or of a partnership or association which is an opposite party, or any person who at the time of the happening of the transaction out of which the suit or proceeding grew, was an employee or agent of the opposite party, or an officer, director, employee or agent of a public or private corporation, or of a partnership or association which is an opposite party, shall have the right to examine and cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true. The witness thus called may be contradicted and impeached by or on behalf of the opposite party, as well as by or on behalf of the party calling the witness, and may be examined by the opposite party upon the subject matter of his examination in chief, but any such examination by the opposite party shall be under the rules of direct examination unless the witness is unwilling or hostile with reference to the opposite party, in which case, the court may, in its discretion, allow the witness to be cross-examined.

(c) **RECORD OF EXCLUDED EVIDENCE.** In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the

evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) **AFFIRMATION IN LIEU OF OATH.** Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) **EVIDENCE ON MOTIONS.** Except as otherwise provided in Rule 56 [93-2707-3], when a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

History: En. Sec. 43, Ch. 13, L. 1961.

Cross-Reference

Compiler's Note

For prior law and annotations thereto, see sec. 93-1901-9.

This section, as enacted by chapter 13, Laws 1961, contained no subdivision (a).

93-2706-7. (Rule 44) Proof of official record. (a) **AUTHENTICATION OF COPY.** An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) **PROOF OF LACK OF RECORD.** A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) **OTHER PROOF.** This rule [section] does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

History: En. Sec. 44, Ch. 13, L. 1961.

93-2706-8. (Rule 45) Subpoena. (a) **FOR ATTENDANCE OF WITNESSES—FORM—ISSUANCE.** Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed

to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) **FOR PRODUCTION OF DOCUMENTARY EVIDENCE.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

(c) **SERVICE.** A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service is made by exhibiting the original and delivering a true copy to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

(d) **SUBPOENA FOR TAKING DEPOSITIONS—PLACE OF EXAMINATION.** (1) Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) [93-2705-5(a) and 93-2705-6(a)], or the presentation of a stipulation for the taking thereof, constitutes a sufficient authorization for the issuance by the clerk of the district court for the county in which the action is pending, or by the clerk of the district court for the county in which a deposition is being taken to be used in an action pending in another state or country, of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) [93-2705-1(b)], but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 [93-2705-5] and subdivision (b) of this Rule 45 [this section], except that if the action is pending out of the state, the court issuing the subpoena shall have the authority to enforce such rules.

(2) A resident of the state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the state may be required to attend in any county of the state wherein he is served with a subpoena.

(e) **SUBPOENA FOR A HEARING OR TRIAL.** At the request of any party subpoenas for attendance at a hearing or trial shall be issued as provided by Rule 45(a) [93-2706-8(a)], and such subpoenas for a hearing or trial in a district court may be served at any place within the state.

(f) **CONTEMPT.** Failure by any person without adequate excuse to

obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

History: En. Sec. 45, Ch. 13, L. 1961.

Cross-Reference

For prior law, see sec. 93-1501-5.

93-2706-9. (Rule 46) Exceptions unnecessary. Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

History: En. Sec. 46, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see sec. 93-5502.

93-2706-10. (Rule 47) Jurors. (a) EXAMINATION OF JURORS. The court shall permit the parties or their attorneys to conduct the examination of prospective jurors under its supervision. The court may supplement the examination by such further inquiry as it deems proper. Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

(b) MANNER OF SELECTION AND ORDER OF EXAMINATION OF JURORS. From the entire jury panel, an initial panel of 20 jurors shall be called in the first instance, and before any voir dire examination of the jury shall be had. Examination of all jurors in the initial panel shall be completed by the plaintiff before examination by the defendant. If challenges for cause are allowed, an additional juror shall be called from the entire panel immediately upon the allowance of challenge, to provide a full initial panel of 20 jurors, whose examination shall be completed before any peremptory challenges are made. When the voir dire examination has been completed, each side shall have four peremptory challenges, and they shall be exercised by the plaintiff first striking one, the defendant then striking one, and so on, until each side has exhausted or waived its right. In event one or more alternate jurors are called, the next jurors remaining in the initial panel, if any, shall be called by the clerk to be the alternate jurors. In event all jurors remaining of original initial panel of 20 jurors, including those substituted for those jurors excused for cause, have been subjected to peremptory challenge, then the clerk shall call additional jurors from the remainder of the jury panel to provide alternate jurors who will be subject to challenge as provided by law. In event there is more than one party defendant, and should it appear that each defendant is entitled to peremptory challenges, then the original panel shall be increased to provide four additional jurors for each defendant who is entitled to exercise peremptory challenges. The clerk shall keep a record of the order in which jurors are called, and in event the entire initial panel has not been exhausted by challenges, the court shall excuse sufficient of the last called jurors until

a jury of twelve persons and the determined number of alternates shall remain to make up the trial jury.

(c) **ALTERNATE JURORS.** The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury arrives at its verdict, become unable or disqualified to perform their duties. An alternate juror shall not join the jury in its deliberation unless called upon by the court to replace a member of the jury. His conduct during the period in which the jury is considering its verdict shall be regulated by instructions of the trial court. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury arrives at its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed by subdivision (b) of this rule [section]. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

History: En. Sec. 47, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see secs. 93-5012 to 93-5014.

93-2706-11. (Rule 48) Juries—verdict. At least two-thirds in number of any jury may render a verdict or finding, and such verdict or finding so rendered shall have the same force and effect as if all such jury concurred therein. The parties may stipulate that the jury shall consist of less number than twelve.

History: En. Sec. 48, Ch. 13, L. 1961.

93-2706-12. (Rule 49) Special verdicts and interrogatories. (a) **SPECIAL VERDICTS.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issues so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) **GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES.** The court may submit to the jury, together with

appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

History: En. Sec. 49, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-5111, 93-5201, and 93-5202.

93-2706-13. (Rule 50) Motion for a directed verdict. (a) **WHEN MADE—EFFECT.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) **RESERVATION OF DECISION ON MOTION.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

History: En. Sec. 50, Ch. 13, L. 1961.

93-2706-14. (Rule 51) Instructions to jury—objection. The court may, during the trial or at the close of the evidence, request each of the parties to submit proposed written instructions on the law of the case. No party

may assign as error the failure to instruct on any point of law unless he offers an instruction thereon. The court shall rule upon the proposed instructions and may prepare other written instructions to be given of its own motion and shall submit to the parties the instructions that will be given and provide opportunity to make objections. Objections made shall specify and state the particular grounds on which the instruction is objected to and it shall not be sufficient in stating the ground of such objection to state generally the instruction does not state the law or is against the law, but such ground of objection shall specify particularly wherein the instruction is insufficient or does not state the law, or what particular clause therein is objected to. All objections and rulings thereon shall be made out of the presence of the jury. No exceptions are necessary to the rulings of the court on the giving or the refusal of instructions. The court shall read to the jury the instructions given before the arguments of counsel are commenced.

History: En. Sec. 51, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see sec. 93-5101.

93-2706-15. (Rule 52) Findings by the court. (a) **EFFECT.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 [93-2703-6 or 93-2707-3] or any other motion except as provided in Rule 41(b) [93-2706-4(b)].

(b) **AMENDMENT.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59 [93-2707-6].

History: En. Sec. 52, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see secs. 93-5303 and 93-5411.

93-2706-16. (Rule 53) Masters. (a) **APPOINTMENT AND COMPENSATION.** Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does

not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) **REFERENCE.** A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) **POWERS.** The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) [93-2706-6(c)] for a court sitting without a jury.

(d) **PROCEEDINGS.** (1) **Meetings.** When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte, or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) **Witnesses.** The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45 [93-2706-8]. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45 [93-2705-12 and 93-2706-8].

(3) **Statement of Accounts.** When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a

showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) **REPORT.** (1) **Contents and Filing.** The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) **In Non-Jury Actions.** In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d) [93-2702-4(d)]. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) **In Jury Actions.** In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) **Stipulations as to Findings.** The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) **Draft Report.** Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

History: En. Sec. 53, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-5401 to 93-5403, 93-5405 to 93-5407, 93-5410 to 93-5412, and 93-8607.

CHAPTER 2707—JUDGMENT

Section 93-2707-1. Judgments—costs.

93-2707-2. Default.

93-2707-3. Summary judgment.

93-2707-4. Declaratory judgments.

93-2707-5. Entry of judgment.

93-2707-6. New trials—amendment of judgments.

93-2707-7. Relief from judgment or order.

93-2707-8. Harmless error.

93-2707-9. Stay of proceedings to enforce a judgment.

93-2707-1. (Rule 54) Judgments—costs. (a) DEFINITION—FORM.

A judgment is the final determination of the rights of the parties in an

action or proceeding and as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.** When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) **DEMAND FOR JUDGMENT.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) **COSTS.** Except when express provision therefor is made either in a statute of the state of Montana or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the state of Montana, its officers, agencies, and political subdivisions shall be imposed only to the extent permitted by law.

History: En. Sec. 54, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-4701, 93-4703, 93-4704, and 93-4709.

93-2707-2. (Rule 55) Default. (a) **ENTRY.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) **JUDGMENT.** Judgment by default may be entered as follows:

(1) **By the Clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person, and has been personally served, otherwise than by publication or personal service outside of this state.

(2) **By the Court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative, or guardian ad litem, who has appeared therein. If the party against whom judgment by default is sought has

appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the state of Montana.

(c) **DEFAULT — SETTING ASIDE — EXTENSION OF TIME BY COURT OR STIPULATION OF PARTIES.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b) [93-2707-7(b)]. No default of any party shall be entered, and no default judgment shall be entered against any party, except upon application of the opposing party. Before entering the default of any person who has been served outside the boundaries of the state of Montana, the court may, in its discretion, appoint a representative for any such person even though such person has not appeared. Any stipulation for extension of time between the parties or their counsel, whether in writing or made verbally before the court, shall be effective to extend the time for serving and/or filing any appearance, motion, pleading or proceeding, according to the terms of such stipulation. In any case if a party in default shall serve and file his appearance, motion, pleading or proceeding prior to application to the clerk for default, then such defaulting party shall not thereafter be considered in default as to that particular appearance, motion, pleading, or proceeding.

(d) **PLAINTIFFS, COUNTERCLAIMANTS, CROSS-CLAIMANTS.** The provisions of this rule [section] apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c) [93-2707-1(c)].

History: En. Sec. 55, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see secs. 93-3603, 93-3905, 93-4120, and 93-4801.

93-2707-3. (Rule 56) Summary judgment. (a) **FOR CLAIMANT.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for a summary judgment in his favor upon all or any part thereof.

(b) **FOR DEFENDING PARTY.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move for a summary judgment in his favor as to all or any part thereof.

(c) **MOTION AND PROCEEDINGS THEREON.** The motion shall be served at least 10 days before the time fixed for the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Affidavits shall not be considered for any purpose on motion for summary judgment. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **CASE NOT FULLY ADJUDICATED ON MOTION.** If on motion under this rule [section] judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. If [It] shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

History: En. Sec. 56, Ch. 13, L. 1961.

Compiler's Note

The bracketed word "It" in subd. (d) of this section, was inserted by the compiler.

93-2707-4. (Rule 57) Declaratory judgments. The procedure for obtaining a declaratory judgment pursuant to sections 93-8901 to 93-8916, both inclusive, of the Revised Codes of Montana, 1947, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39 [93-2706-1 and 93-2706-2], subject to the provisions of section 93-8909, Revised Codes of Montana, 1947. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

History: En. Sec. 57, Ch. 13, L. 1961.

93-2707-5. (Rule 58) Entry of judgment. Unless the court otherwise directs and subject to the provisions of Rule 54(b) [93-2707-1(b)], judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49 [93-2706-12]. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment.

ment and direct that it be entered by the clerk. The entry of the judgment shall not be delayed for the taxing of costs.

History: En. Sec. 58, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see sec. 93-5701.

93-2707-6. (Rule 59) New trials—amendment of judgments. (a) **GROUND.** A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons provided by the statutes of the state of Montana. On motion for a new trial in an action tried without a jury, the court may take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, set aside, vacate, modify or confirm any judgment that may have been entered or direct the entry of a new judgment.

(b) **TIME FOR MOTION.** A motion for a new trial shall be served not later than 10 days after service of notice of the entry of the judgment.

(c) **TIME FOR SERVING AFFIDAVITS.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **ON INITIATIVE OF COURT.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefore.

(e) **MOTION TO ALTER OR AMEND A JUDGMENT.** A motion to alter or amend the judgment shall be served not later than 10 days after service of notice of the entry of the judgment.

History: En. Sec. 59, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto, see sec. 93-5605.

93-2707-7. (Rule 60) Relief from judgment or order. (a) **CLERICAL MISTAKES.** Clerical mistakes in judgments, orders or other parts of the record, and in pleadings, and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(b) **MISTAKES — INADVERTENCE — EXCUSABLE NEGLIGENCE — NEWLY DISCOVERED EVIDENCE—FRAUD, ETC.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) [93-2707-6(b)]; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged,

or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule [section] does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as may be provided by law, or to set aside a judgment for fraud upon the court.

History: En. Sec. 60, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see sec. 93-3905.

93-2707-8. (Rule 61) Harmless error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

History: En. Sec. 61, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see sec. 93-3909.

93-2707-9. (Rule 62) Stay of proceedings to enforce a judgment. (a) STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT—STAY UPON ENTRY OF JUDGMENT. In a district court action, execution or other proceedings to enforce a judgment may issue immediately upon the entry of judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, shall not be stayed during the period after its entry and until the appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule [section] govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) STAY ON MOTION FOR NEW TRIAL OR FOR JUDGMENT. In its discretion and on such conditions for the security of the adverse party as are proper, the district court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59 [93-2707-6], or of a motion for relief from a judgment or order made pursuant to Rule 60 [93-2707-7], or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50

[93-2706-13], or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b) [93-2706-15(b)].

(c) **INJUNCTION PENDING APPEAL.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the district court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) **STAY UPON APPEAL.** When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule [section]. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) **STAY IN FAVOR OF THE STATE OF MONTANA OR AGENCY THEREOF.** When an appeal is taken by the state of Montana or an officer or agency or governmental subdivision thereof, and the operation or enforcement of the judgment is stayed, no security shall be required from the appellant. In all cases, the parties may by written stipulation waive the filing of security.

(g) **POWER OF APPELLATE COURT NOT LIMITED.** The provisions in this rule [section] do not limit any power of the supreme court of the state of Montana or of a justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) **STAY OF JUDGMENT UPON MULTIPLE CLAIMS.** When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b) [93-2707-1 (b)], the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

History: En. Sec. 62, Ch. 13, L. 1961.

Cross-Reference

Compiler's Note

This section, as enacted by chapter 13, Laws 1961, contained no subdivision (f).

For prior law and annotations thereto, see secs. 93-8007 to 93-8010.

CHAPTER 2708—PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Section 93-2708-1. Seizure of person or property.

93-2708-2. Injunctions.

93-2708-3. Receivers.

93-2708-4. Deposit in court.

93-2708-5. Offer of judgment.

93-2708-6. Execution.

93-2708-7. Judgment for specific acts—vesting title.

93-2708-8. Process in behalf of and against persons not parties.

93-2708-1. (Rule 64) Seizure of person or property. At the commencement of and during the course of an action, all remedies providing for

seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the actions are available under the circumstances and in the manner provided by law.

History: En. Sec. 63, Ch. 13, L. 1961.

93-2708-2. (Rule 65) Injunctions. The procedure for granting restraining orders and temporary and permanent injunctions shall be as provided by statute.

History: En. Sec. 64, Ch. 13, L. 1961.

93-2708-3. (Rule 66) Receivers. An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the appointment of and administration of estates by receivers or other similar officers shall be in accordance with the Montana statutes and with the practice heretofore followed in the courts of this state. In all other respects, the action in which the appointment of the receiver is sought or which is brought by or against a receiver is governed by these rules.

History: En. Sec. 65, Ch. 13, L. 1961.

93-2708-4. (Rule 67) Deposit in court. In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule [section] shall be deposited and withdrawn in accordance with the provisions of Chapter 45, Title 93, Revised Codes of Montana, 1947.

History: En. Sec. 66, Ch. 13, L. 1961.

93-2708-5. (Rule 68) Offer of judgment. At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with cost then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

History: En. Sec. 67, Ch. 13, L. 1961.

Cross-Reference

For prior law and annotations thereto,
see sec. 93-8201.

93-2708-6. (Rule 69) Execution. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of and supplementary to execution shall be in accordance with the statutes of the state of Montana. In aid of the judgment or execution,

the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions.

History: En. Sec. 68, Ch. 13, L. 1961.

93-2708-7. (Rule 70) Judgment for specific acts—vesting title. If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the court may order the clerk to issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

History: En. Sec. 69, Ch. 13, L. 1961.

93-2708-8. (Rule 71) Process in behalf of and against persons not parties. When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

History: En. Sec. 70, Ch. 13, L. 1961.

CHAPTER 2709—APPEALS

Section 93-2709-1. Appeal from a district court to the supreme court.

93-2709-1. (Rule 72) Appeal from a district court to the supreme court. When an appeal is permitted by law from a district court to the supreme court of Montana, an appeal shall be taken, perfected, and prosecuted pursuant to the provisions of Chapter 80 of Title 93, Code of Civil Procedure, Revised Codes of Montana, 1947, as amended, except to the extent that such provisions are superseded by Rule 62 [93-2707-9], and pursuant to the rules of the supreme court of Montana governing such an appeal.

History: En. Sec. 71, Ch 13, L. 1961.

CHAPTER 2710—DISTRICT COURTS AND CLERKS

Section 93-2710-1. District courts and clerks.

93-2710-2. Stenographer—stenographic report or transcript as evidence.

93-2710-1. (Rule 77) District courts and clerks. (a) DISTRICT COURTS ALWAYS OPEN. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of

issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) **TRIALS AND HEARINGS—ORDERS IN CHAMBERS.** All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one *ex parte*, shall be conducted outside the district without the consent of all parties affected thereby.

(c) **CLERK'S OFFICE AND ORDERS BY CLERK.** All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) **NOTICE OF ENTRY OF JUDGMENT SERVED.** Within 10 days after entry of judgment in an action in which an appearance has been made, notice of such entry, together with a copy of such judgment or a general description of the nature and amount of relief and damages thereby granted, shall be served by the prevailing party upon the adverse party.

History: En. Sec. 72, Ch. 13, L. 1961.

93-2710-2. (Rule 80) Stenographer—stenographic report or transcript as evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

History: En. Sec. 73, Ch. 13, L. 1961.

CHAPTER 2711—GENERAL PROVISIONS

- Section 93-2711-1. Applicability [of rules] in general.
 93-2711-2. Jurisdiction and venue unaffected.
 93-2711-3. Rules by district courts.
 93-2711-4. Forms.
 93-2711-5. Title.
 93-2711-6. Appendix of forms.
 93-2711-7. Special statutory proceedings under Rule 81.

93-2711-1. (Rule 81) Applicability [of rules] in general. (a) **SPECIAL STATUTORY PROCEEDINGS.** The statutory proceedings listed in Table A [93-2711-7] and any other special statutory proceeding, whether or not listed in Table A [93-2711-7], are excepted from these rules insofar as they are inconsistent or in conflict with the procedure and practice provided by these rules.

(b) **APPEALS TO DISTRICT COURTS.** These rules do not supersede the provisions of statutes relating to appeals to or review by the district courts, but shall govern procedure and practice relating thereto insofar as these rules are not inconsistent with such statutes.

(c) **RULES INCORPORATED INTO STATUTES.** Where any statute heretofore or hereafter enacted, whether or not applicable to a special statutory proceeding or listed in any table appended hereto, provides that any act in a civil proceeding in a district court shall be done in the manner provided by law or as in a civil action or as provided by any statute superseded by these rules, such act shall be done in accordance with these rules and the procedure thereon shall conform to these rules, insofar as practicable.

History: En. Sec. 74, Ch. 13, L. 1961.

93-2711-2. (Rule 82) Jurisdiction and venue unaffected. Except as provided in Rule 4 [93-2702-2] these rules shall not be construed to extend or limit the jurisdiction of the district courts of Montana or the venue of actions therein.

History: En. Sec. 75, Ch. 13, L. 1961.

93-2711-3. (Rule 83) Rules by district courts. Each district court, upon agreement of the judges or a majority thereof, may from time to time make and amend rules governing its practice not inconsistent with these rules or other rules prescribed by the supreme court. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the supreme court of this state. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

History: En. Sec. 76, Ch. 13, L. 1961.

93-2711-4. (Rule 84) Forms. The forms contained in the Appendix of Forms [93-2711-6] are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

History: En. Sec. 77, Ch. 13, L. 1961.

93-2711-5. (Rule 85) Title. These rules shall be known as the Montana Rules of Civil Procedure and may be cited as M. R. Civ. P.

History: En. Sec. 78, Ch. 13, L. 1961.

Effective Date

Section 79 of Ch. 13, Laws 1961, read as follows: "Section 79. Rule 86. Effective date; statutes superseded.—(a) Effective Date and Application to Pending Proceedings. These rules will take effect on January 1, 1962. They govern all proceedings and actions brought after they take effect, and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application

in a particular action pending when the rules take effect would not be feasible, or would work injustice, in which event the procedure existing at the time the action was brought applies.

"(b) Statutes Superseded. Upon the taking effect of these rules all statutes and parts of statutes in conflict herewith and the statutes listed in Tables B and C [93-2711-7, notes] are superseded in respect of practice and procedure in the district courts."

93-2711-6. Appendix of forms.

Form 1. SUMMONS—OFFICIAL FORM.

IN THE DISTRICT COURT OF THE JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF

A.B.,		Plaintiff	}	SUMMONS
	vs.			
C.D.,		Defendant	}	

The State of Montana to the above-named defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness my hand and the seal of said court, this day of

E. F.
Attorney for Plaintiff,
.....
(Address)
..... Montana.

Form 2. COMPLAINT ON A PROMISSORY NOTE.

1. Defendant on or about June 1, 1958, executed and delivered to plaintiff a promissory note "in the following words and figures: (here set out the note verbatim)"; "a copy of which hereto annexed as Exhibit A"; "whereby defendant promised to pay to plaintiff or order on June 1, 1959, the sum of dollars with interest thereon at the rate of per cent per annum."¹

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of dollars, interest, and costs.

Form 3. COMPLAINT ON AN ACCOUNT.

Defendant owes plaintiff dollars according to the account hereto annexed as Exhibit A.

Wherefore plaintiff demands judgment against defendant for the sum of dollars, interest, and costs.

¹ The pleader may use the material in one of the three sets of brackets. This choice will depend upon whether he desires to plead the document verbatim, or by exhibit, or according to its legal effect.

Form 4. COMPLAINT FOR GOODS SOLD AND DELIVERED.

Defendant owes plaintiff dollars for goods sold and delivered by plaintiff to defendant between June 1, 1959, and December 1, 1959.

Wherefore plaintiff demands judgment against defendant for the sum of dollars, interest, and costs.

Form 5. COMPLAINT FOR MONEY LENT.

Defendant owes plaintiff dollars for money lent by plaintiff to defendant on June 1, 1959, which is now due.

Wherefore plaintiff demands judgment against defendant for the sum of dollars, interest, and costs.

Form 6. COMPLAINT FOR MONEY PAID BY MISTAKE.

Defendant owes plaintiff dollars for money paid by plaintiff to defendant by mistake on June 1, 1959, under the following circumstances; (stating the circumstances with particularity. See Rule 9(b) [93-2703-3(b)]).

Wherefore plaintiff demands judgment against defendant for the sum of dollars, interest, and costs.

Form 7. COMPLAINT FOR MONEY HAD AND RECEIVED.

Defendant owes plaintiff ten thousand dollars for money had and received from one C. H. on June 1, 1959, to be paid by defendant to plaintiff.

Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs.

Form 8. COMPLAINT FOR NEGLIGENCE.

1. On June 1, 1959, in a public highway called State Street, in Helena, Montana, defendant negligently drove a motor vehicle against the plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of dollars.

Wherefore plaintiff demands judgment against defendant in the sum of dollars and costs.

Form 9. COMPLAINT FOR NEGLIGENCE WHERE PLAINTIFF IS UNABLE TO DETERMINE DEFINITELY WHETHER THE PERSON RESPONSIBLE IS C. D. OR E. F. OR WHETHER BOTH ARE RESPONSIBLE AND WHERE HIS EVIDENCE MAY JUSTIFY A FINDING OF WILLFULNESS OR OF RECKLESSNESS OR OF NEGLIGENCE.

1. On June 1, 1959, in a public highway called State Street in Helena, Montana, defendant C. D. or defendant E. F., or both defendants C. D. and

E. F. willfully or recklessly or negligently drove or caused to be driven a motor vehicle against the plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of dollars and costs.

Form 10. COMPLAINT FOR CONVERSION.

On or about December 1, 1959, defendant converted to his own use ten bonds of the Company (inserting brief identification as by number and issue) of the value of dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of dollars, interest and costs.

Form 11. COMPLAINT FOR SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND.

1. On or about December 1, 1958, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

2. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

3. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement; (2) damages in the sum of dollars; (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of dollars; and (4) judgment for costs.

Form 12. COMPLAINT ON CLAIM FOR DEBT AND TO SET ASIDE FRAUDULENT CONVEYANCE UNDER RULE 18(b) [93-2704-2(b)].

1. Defendant C. D. on or about June 1, 1958, executed and delivered to plaintiff a promissory note (setting forth the note verbatim, or in substance and legal effect, or by annexing a copy, as in Form 2).

2. Defendant C. D. owes to plaintiff the amount of said note and interest.

3. Defendant C. D. on or about December 1, 1958, conveyed all his property, real and personal (or specify and describe) to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands judgment (1) against defendant C. D. for dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) for plaintiff's costs.

Form 13. COMPLAINT FOR NEGLIGENCE UNDER FEDERAL EMPLOYERS' LIABILITY ACT (45 U. S. C. A., §§ 51-58).

1. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at and known as Tunnel No.

2. On or about June 1, 1958, defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

3. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

4. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock, which fell from the unsupported portion of the tunnel, and was (describing plaintiff's injuries).

5. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning dollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of dollars for medicine, medical attendance and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of dollars and costs.

Form 14. COMPLAINT FOR INTERPLEADER AND DECLARATORY RELIEF.

1. On or about June 1, 1956, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of ten thousand dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 1956, and annually thereafter as a condition precedent to its continuance in force.

2. No part of the premium due June 1, 1956, was ever paid and the policy ceased to have any force or effect on July 1, 1956.

3. Thereafter, on September 1, 1956, G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

4. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designated as beneficiary of said policy in place of K. L.

5. Each of defendants C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

6. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

Form 15. MOTION TO DISMISS.

The defendant moves the court as follows:

(1) To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

(2) To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds: (Here state reasons, such as (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the State of Montana; (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B, respectively; (c) (etc.).)

.....
Attorney for Defendant

.....
Address

Notice of Motion

To:, Attorney for Plaintiff:

Please take notice, that the undersigned will bring the above motion for hearing before this court at the courtroom thereof in the Courthouse at, Montana, on the day of, 19....., at o'clock M. or as soon thereafter as counsel can be heard.

.....
Attorney for Defendant

.....
Address

Form 16. ANSWER PRESENTING DEFENSES UNDER RULE 12(b) [93-2703-6(b)].

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

If defendant is indebted to plaintiff for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen and resident of the State of Montana; is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party, but has not been made one.

THIRD DEFENSE

Defendant admits the allegation(s) contained in paragraph(s) of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph(s) of the complaint; and denies each and every other allegation contained in the complaint.

FOURTH DEFENSE

The right of action set forth in the complaint did not accrue within years next before the commencement of this action, and is therefore barred by the provisions of section (setting forth the particular section or subsection applicable thereto).

COUNTERCLAIM

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint.)

CROSS-CLAIM AGAINST DEFENDANT M. N.

(Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint.)

Form 17. ANSWER TO COMPLAINT SET FORTH IN FORM 7, WITH COUNTERCLAIM FOR INTERPLEADER.

DEFENSE

Defendant denies the allegations of the complaint to the extent set forth in the counterclaim herein.

COUNTERCLAIM FOR INTERPLEADER

1. Defendant received the sum of ten thousand dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E. F. to be made a party defendant to respond to the complaint and to this counterclaim.

(2) That the court order the plaintiff and E. F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

Form 18. SUMMONS AND THIRD-PARTY COMPLAINT — INTER-
PLEADER.

A. B.,	Plaintiff,	}	THIRD PARTY SUMMONS Civil No.....
vs.			
C. D.,	Defendant, and Third-Party Plaintiff,		
vs.			
E. F.,	Third-Party Defendant.		

THE STATE OF MONTANA TO THE ABOVE-NAMED THIRD-PARTY DEFEND-
ANT:

You are hereby summoned to answer the third-party complaint in this
action which is filed in the office of the clerk of this court, a copy of which
is herewith served upon you, and to file your answer and serve a copy
thereof upon the plaintiff's attorney and upon the attorney for defendant
and third-party plaintiff within twenty days after the service of this third-
party summons, exclusive of the day of service; and in case of your failure
to appear or answer, judgment will be taken against you by default for
the relief demanded in the third-party complaint.

Witness my hand and the seal of said court, this day of

(COURT SEAL) Clerk of the District Court

G. H.
Attorney for Defendant
and Third-party Plaintiff

.....
(Address)
....., Montana

The name and address of the
attorney for Plaintiff is:
J. K.

.....
(Address)
....., Montana

A. B.,	Plaintiff,	}	THIRD PARTY COMPLAINT Civil No.....
vs.			
C. D.,	Defendant, and Third-Party Plaintiff,		
vs.			
E. F.,	Third-Party Defendant.		

1. Plaintiff A. B. has filed against defendant C. D., a complaint, a
copy of which is hereto attached as Exhibit C.
2. (Here state the grounds upon which C. D. is entitled to recover

from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for dollars and for costs.

Attorney for Third-Party Plaintiff

(Address)

Form 19. MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24 [93-2704-8].

A. B.,		Plaintiff,	} MOTION TO INTERVENE AS A DEFENDANT Civil No.
	vs.		
C. D.,		Defendant,	
E. F.,		Applicant for Intervention	

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground (here set forth generally the grounds upon which intervention is sought, in accordance with the right of intervention contained in Rule 24 [93-2704-8] and as such as a defense to plaintiff's claim presenting (setting forth whether the same relates to questions of law or fact, or both) which are common to the main action.

Attorney for E. F., Applicant for Intervention

(Address)

NOTICE OF MOTION

(Contents the same as those in Form 15, or notice and motion may be combined in a notice of motion as provided in Rule 7(b) [93-2703-1(b)].)

INTERVENOR'S ANSWER

(Set forth defenses in accordance with the outline contained in Form 16.)

Form 20. MOTION FOR PRODUCTION, ETC., UNDER RULE 34 [93-2705-9].

Plaintiff A. B. moves the court for an order requiring defendant C. D.:

(1) To produce and to permit plaintiff to inspect and to copy each of the following documents:

(Here list the documents and describe each of them)

(2) To produce and permit plaintiff to inspect and to photograph each of the following objects:

(Here list the objects and describe each of them)

(3) To permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph (here describe the portion of the real property and the objects to be inspected and photographed).

Defendant C. D. has the possession, custody, or control of each of the foregoing documents and objects and of the above mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

Attorney for Plaintiff

Address

EXHIBIT A

STATE OF MONTANA
County of Lewis and Clark } ss.

A. B., being first duly sworn says:

(1) (Here set forth all that plaintiff knows which shows that defendant has the papers or objects in his possession or control.)

(2) (Here set forth all that plaintiff knows which shows that each of the above mentioned items is relevant to some issue in the action.)

A. B. (Signed)

(Jurat)

Form 21. REQUEST FOR ADMISSION UNDER RULE 36 [93-2705-11].

Plaintiff A. B. requests defendant C. D. within days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.

(Here list the statements.)

Attorney for Plaintiff

Address

Form 22. ALLEGATION OF REASON FOR OMITTING NECESSARY PARTY.

John Doe named in this complaint is not made a party to this action (because he is not subject to the jurisdiction of this court); or (for reasons stated).

History: En. Sec. 80, Ch. 13, L. 1961.

93-2711-7. (Table A) Special statutory proceedings under Rule 81. Following is a list of sections of the Revised Codes of Montana, 1947, as amended, pertaining to special proceedings which are excepted from these rules in so far as they are inconsistent or in conflict with the procedure and practice provided by these rules:

Review of beer license, revocation, suspension or denial.....	4-342
Review of liquor license revocation, suspension, or denial.....	4-425
Closed bank proceedings	5-1107
Review of decision of superintendent of banks	5-1108
Appeal from decision of superintendent of banks.....	5-1112
Closed banks, procedure for disposition of assets.....	5-1118
Appointment of trustee of cemetery association	9-121
Removal of dedication of property for cemetery	9-816, 9-817
Proceedings re dependent and neglected children	Title 10, Ch. 5
Juvenile courts	Title 10, Ch. 6
Appeal from city approval of emergency expenditures.....	11-1409
Appeal from appraisalment of damage to landowner caused by change of grade of street or sidewalk	11-2604, 11-2605
Review of decision of municipal board of adjustment re zoning regulations	11-2707
Determination of title to lots in entry townsites.....	11-3014, 11-3026
Formation of agricultural or co-operative corporations or districts	14-302 to 14-304
Creation of indebtedness of same	14-319, 14-320
Lost or destroyed stock certificates	15-644
Dissolution of corporations	15-1108 to 15-1114
Assignments for benefit of creditors	18-314 to 18-326
Contesting nominations	23-926 to 23-928
Recount of votes	23-2301 to 23-2304
Appeal from revocation of oleomargarine license	27-517
Appeal from revocation of driver's license	31-152
Appraisalment of homestead subject to execution	33-109 to 33-123
Insane, examination and commitment	38-201 to 38-214
Same, voluntary	38-401 to 38-412
Eugenical sterilization law	38-606
Inebriates, commitment	38-701 to 38-711
State training school, commitment to	38-801 to 38-819
Senile aged, commitment	38-1101 to 38-1112
Insurance Code effective January 1, 1961:	
Appeals from commissioner of insurance	40-2725
Service of process	40-2818, 40-2819

Unauthorized insurers—service of process, defense of actions, attorneys' fees	40-3403 to 40-3408
Surplus lines, service of process	40-3423, 40-3424
Prohibited or undefined trade practices—injunction proceed- ings, and appeals from commissioner's report	40-3514, 40-3515
Appeals from decisions of commissioner of insurance respecting rates and rating organizations	40-3633
Delinquency proceedings against insurance companies	40-5101 to 40-5133
Fraternal benefit societies, service of process	40-5352
Fraternal benefit societies, injunction and quo warranto pro- ceedings	40-5356, 40-5357
Grazing district appeal procedure	46-2308
State mine inspector, procedure for investigation of charges of neglect of duty	50-410
Review of order of Montana trade commission	51-113
Appeal from decision of highway patrol supervisor	53-419
Review of orders of oil and gas conservation commission	60-135
Uniform Adoption Act	61-201 to 61-217
Appeal from decision of board of medical examiners	66-1004
Review of order of board of pharmacy	66-1509
Commitment to state tuberculosis hospital.....	69-307 to 69-310 and 69-313
Establishing birth	69-522
Review of decision of board of health or water pollution council.....	69-1335
Review of actions of public service commission	70-128
Review of action of board of railroad commissioners	72-125
Review of school trustees' resolution to sell school property	75-1634
Compulsory attendance at school	75-2901
State industrial school, commitment	75-3001, 75-3002
State industrial school	80-810 and 80-815 to 80-817
State vocational school, commitment	80-918 to 80-921
Female reformatories, commitment	80-1002, 80-1003
Proceedings to abate fire hazards	82-1219 to 82-1222
Appeal from decision of commissioner of agriculture.....	84-3410 to 84-3412
Action to confirm tax deed	84-4144 to 84-4150
Action to quiet title to tax deed property	84-4158
Action to procure tax deed	84-4162 to 84-4169
Complaint in action to collect taxes by suit	84-4302
Cigarette tax appeal	84-5617
Administration of trusts	86-315 to 86-326
Review of order of unemployment compensation commission.....	87-108
Insecure dams	89-702 to 89-714
Creation of irrigation districts	89-1201 to 89-1204
Irrigation districts—changing boundaries, correcting errors, fixing taxable acreage, etc.	Title 89, Ch. 14
Confirmation of resolution authorizing bonds for irrigation district.....	89-1704
Dissolution of irrigation districts	89-2001 to 89-2008
Irrigation districts, appeals	89-2101, 89-2102
Drainage districts, creation	Title 89, Ch. 22

Drainage districts, commissioners	Title 89, Ch. 23
Proceedings to alter or add to drainage district	Title 89, Ch. 27
Miscellaneous provisions respecting drainage districts	Title 89, Ch. 28
Escheated estate proceedings	91-515 to 91-518
Procedure to obtain authority to mortgage, lease, or sell part of estate	Title 91, Ch. 31
Determination of heirship	91-3801 to 91-3803
Termination of life estate or joint tenancy	91-4321
Appointment of guardians of minors	91-4601
Appointment of guardians of insane and incompetent persons	91-4701, 91-4702
Restoration to capacity	91-4704
Uniform Veterans' Guardianship Act	Title 91, Ch. 48
Procedure to mortgage or lease by guardians	91-4911
Property sale by guardians	91-5005 to 91-5013
Guardians of nonresidents	Title 91, Ch. 51
Examination and removal of guardians, etc.	91-5201, 91-5202
Proceedings supplementary to execution	93-5901 to 93-5913
Quiet title (including actions to establish title to property granted to heirs of deceased entrymen)	93-6201 to 93-6239
Partition of property	93-6301 to 93-6360
Certiorari	93-9001 to 93-9011
Mandamus	93-9101 to 93-9114
Prohibition	93-9201 to 93-9204
Provisions applicable to certiorari, mandamus, and prohibition	93-9301 to 93-9303
Eminent domain	93-9901 to 93-9926
Change of name	93-100-1 to 93-100-9
Judicial determination of birth	93-101-1 to 93-101-6
Arbitration	93-201-1 to 93-201-10
Bastardy proceedings	94-9901 to 94-9908
Habeas corpus	94-101-1 to 94-101-33
Uniform Reciprocal Enforcement of Support Act	94-901-1 to 94-901-18

History: En. Sec. 81, Ch. 13, L. 1961.**Compiler's Note**

Sections 94-901-1 to 94-901-18, inclusive, referred to in this section, were repealed by Sec. 3, Ch. 208, Laws 1961. For new provisions, see secs. 93-2601-1 to 93-2601-40.

Rules Superseding Statutes

Section 82 of Ch. 13, Laws 1961 enacted a table of rules superseding statutes as follows:

TABLE B. LIST OF RULES SUPERSEDING STATUTES

		Statutes Superseded (R.C. 1947, sections)	
Rule	Statutes Superseded (R.C. 1947, sections)	Rule	Statutes Superseded (R.C. 1947, sections)
		4D(11)	93-3017
4	93-2816, 93-3006, 93-3007, 93-3013, 93-3014, 93-3015	5	93-3819, 93-8501, 93-8502, 93-8503, 93-8507
4 (with Rule 12(a))	93-3003	5 (with Rule 6(e))	93-8504
4D(9), (10)	93-3018	6(b) (with Rules 15(a), 55(c), 60)	93-3905
		6(d) and (e)	93-8403
		6(e) (with Rule 5)	93-8504
		7(a)	93-3101, 93-3102, 93-3103, 93-3201, 93-3601, 93-3603
		7(b)	93-8401
		7(c)	93-3301, 93-3302, 93-3303, 93-3306, 93-3501, 93-3502, 93-3503, 93-3504, 93-3505, 93-3506, 93-3604, 93-3907, 93-4902
		8(a)	93-3202, 93-3412, 93-3808, 93-3812
		8(b)	93-3401(1), 93-3410, 93-3411, 93-3813, 93-3816
		8(c)	93-3401(2)
		8(d)	93-3815, 93-3817, 93-4904

Rule	Statutes Superseded (R.C. 1947, sections)	Rule	Statutes Superseded (R.C. 1947, sections)
8(e) (1)	93-3202 (2)	32(c) (1)	93-1801-10
8(e) (2)	93-3410, 93-3602	32(c) (2)	93-1801-10
8(f)	93-3801, 93-3909	32(c) (3)	93-1801-5
9(a)	93-3301 (2), 93-3505 (2)	34	93-8301
9(c)	93-3807	38(d)	93-5301
9(d)	93-3811	39(a)	93-4905
9(e)	93-3806	39(b)	93-4905, 93-5301
10(a)	93-3202 (1)	40	93-4908, 93-4909
10(b)	93-3410, 93-3602	41(a) (1)	93-4705 (1), (2)
10(c)	93-3820	41(b)	93-4705 (3), (4), (5), 93-4708
11	93-3701	42(a)	93-8705
12(a) (with Rule 4)	93-3003	42(b)	93-4906
12(b)	93-2905, 93-3301, 93-3305, 93-3501, 93-3502, 93-3504, 93-3505, 93-3506, 93-3604, 93-4902	43(b)	93-1901-9
12(e)	93-3301 (7)	45(c)	93-1501-5
12(f)	93-3802, 93-3803	46	93-5502
12(h)	93-3306	47(a)	93-5012
13(a)	93-3408	47(b)	93-5013, 93-5014
13(b)	93-3402	49	93-5111, 93-5201, 93-5202
13(c)	93-3402, 93-3404, 93-3405, 93-5703	51	93-5101 (5)
13(g)	93-3415	52(a)	93-5303, 93-5411
14(a)	93-3415	53(a)	93-5403, 93-5407, 93-8607
15(a)	93-3304, 93-3904	53(b)	93-5401, 93-5402
15(a) (with Rules 6(b), 55(c), 60)	93-3905	53(c)	93-5401, 93-5402, 93-5406, 93-5407
15(b)	93-2303, 93-3901, 93-3902, 93-3903, 93-3909	53(d)	93-5405, 93-5406, 93-5410
15(d)	93-3818	53(e)	93-5410, 93-5411, 93-5412
17(a)	93-2801	54(a)	93-4701
17(b)	93-2805	54(b)	93-4703
18(a)	93-3203	54(c)	93-4704
19(a)	93-2821	54(d)	93-4709
19(b)	93-2828	55(a)	93-4801 (1), (2)
20(a)	93-2811, 93-2812, 93-2818, 93-2822	55(b) (1)	93-4801 (1)
20(b)	93-4906	55(b) (2)	93-4120, 93-4801 (2), (3), (4)
22	93-2825	55(c) (with Rules 6(b), 15(a), and 60)	93-3905
23	93-2821	55(d)	93-3603
24	93-2826, 93-2828	58	93-5701
25	93-2824	59(b), (c)	93-5605
26 to 32, inclusive	93-1801-1 to 93-1801-16, inclusive	60 (with Rules 6(b), 15(a), and 55(c))	93-3905
26(a)	93-1801-2, 93-1801-3	61	93-3909
26(b)	93-1801-2, 93-1801-3, 93-1801-4	62(d)	93-8007, 93-8008, 93-8009, 93-8010
26(c)	93-1801-10	68	93-8201
26(d) (2)	93-1801-8	Statutes Superseded by Rules	
26(d) (3)	93-1801-3, 93-1801-10	Section 83 of Ch. 13, Laws 1961 enacted a table of statutes superseded by rules as follows:	
26(d) (5)	93-1801-12	TABLE C. LIST OF STATUTES SUPERSEDED BY RULES	
26(e)	93-1801-10	Statutes Superseded (R. C. 1947, sections)	Rules
27(a)	93-2301-1 to 93-2301-7, inclusive	93-2303	15(b)
28(a)	93-1801-4, 93-1801-9	93-2801	17(a)
28(b)	93-1801-4	93-2805	17(b)
28(d)	93-1801-13, 93-1801-14, 93-1801-15	93-2811	20(a)
29	93-1801-4, 93-1801-5, 93-1801-10	93-2812	20(a)
30(a)	93-1801-4, 93-1801-9	93-2816	4
30(c)	93-1801-6, 93-1801-10	93-2818	20(a)
30(e)	93-1801-10, 93-1801-11	93-2821	19(a), 23
30(f) (1)	93-1801-6, 93-1801-10	93-2822	20(a)
31(a)	93-1801-5	93-2824	25
31(b)	93-1801-5, 93-1801-6		
31(d)	93-1801-5		
32(a)	93-1801-11		
32(b)	93-1801-11		

GENERAL PROVISIONS

93-2711-7

Statutes Superseded (R.C. 1947, sections)	Rules	Statutes Superseded (R.C. 1947, sections)	Rules
93-2825	22	93-3820	10(c)
93-2826	24	93-3901	15(b)
93-2828	19(b), 24	93-3902	15(b)
93-2905	12(b)	93-3903	15(b)
93-3003	4 and 12(a) together	93-3904	15(a)
93-3006	4	93-3905	6(b), 15(a), 55(c), and 60 together
93-3007	4	93-3907	7(c)
93-3013	4	93-3909	8(f), 15(b), 61
93-3014	4	93-4120	55(b) (2)
93-3015	4	93-4701	54(a)
93-3017	4D(11)	93-4703	54(b)
93-3018	4D(9), (10)	93-4704	54(c)
93-3101	7(a)	93-4705(1), (2)	41(a) (1)
93-3102	7(a)	93-4705(3), (4), (5)	41(b)
93-3103	7(a)	93-4708	21(b)
93-3201	7(a)	93-4709	54(d)
93-3202	8(a)	93-4801(1)	55(a), 55(b) (1)
93-3202(1)	10(a)	93-4801(2)	55(a), 55(b) (2)
93-3202(2)	8(e) (1)	93-4801(3)	55(b) (2)
93-3203	18(a)	93-4801(4)	55(b) (2)
93-3301	7(c), 12(b)	93-4902	7(c), 12(b)
93-3301(2)	9(a)	93-4904	8(d)
93-3301(7)	12(c)	93-4905	39(a), 39(b)
93-3302	7(c)	93-4906	20(b), 42(b)
93-3303	7(c)	93-4908	40
93-3304	15(a)	93-4909	40
93-3305	12(b)	93-5012	47(a)
93-3306	7(c), 12(h)	93-5013	47(b)
93-3401(1)	8(b)	93-5014	47(b)
93-3401(2)	8(c)	93-5101(5)	51
93-3402	13(b), 13(c)	93-5111	49
93-3404	13(c)	93-5201	49
93-3405	13(c)	93-5202	49
93-3408	13(a)	93-5301	38(d), 39(m)
93-3410	8(b), 8(e) (2), 10(b)	93-5303	52(a)
93-3411	8(b)	93-5401	53(b), 53(c)
93-3412	8(a)	93-5402	53(b), 53(c)
93-3415	13(g), 14(a)	93-5403	53(a)
93-3501	7(c), 12(b)	93-5405	53(d)
93-3502	7(c), 12(b)	93-5406	53(c), 53(d)
93-3503	7(c)	93-5407	53(a), 53(c)
93-3504	7(c), 12(b)	93-5410	53(d), 53(e)
93-3505	7(c), 12(b)	93-5411	52(a), 53(e)
93-3505(2)	9(a)	93-5412	53(e)
93-3506	7(c), 12(b)	93-5502	46
93-3601	7(a)	93-5605	59(b), (c)
93-3602	8(e) (2), 10(b)	93-5701	58
93-3603	7(a), 55(d)	93-5703	13(c)
93-3604	7(c), 12(b)	93-8007	62(d)
93-3701	11	93-8008	62(d)
93-3801	8(f)	93-8009	62(d)
93-3802	12(f)	93-8010	62(d)
93-3803	12(f)	93-8201	68
93-3806	9(e)	93-8301	34
93-3807	9(c)	93-8401	7(b)
93-3808	8(a)	93-8403	6(d) and (e)
93-3811	9(d)	93-8501	5
93-3812	8(a)	93-8502	5
93-3813	8(b)	93-8503	5
93-3815	8(d)	93-8504	5 and 6(e) together
93-3816	8(b)	93-8507	5
93-3817	8(d)	93-8607	53(a)
93-3818	15(d)	93-8705	42(a)
93-3819	5		

**Statutes Superseded
(R.C. 1947, sections)****Rules**

93-1501-5	45(c)
93-1801-1 to 93-1801-16, inclusive	26 to 32, inclusive
93-1801-2	26(a), 26(b)
93-1801-3	26(a), 26(b), 26(d) (3)
93-1801-4	26(b), 28(a), 28(b), 29, 30(a)
93-1801-5	29, 31(a), 31(b), 31(d), 32(c) (3)
93-1801-6	30(c), 30(f) (1), 31(b)
93-1801-8	26(d) (2)
93-1801-9	28(a), 30(a)
93-1801-10	26(c), 26(d), (3), 26(e), 29, 30(c), 30(e), 30(f) (1), 32(c) (1), 32(c) (2)
93-1801-11	30(e), 32(a), 32(b)
93-1801-12	26(d) (5)
93-1801-13	28(d)
93-1801-14	28(d)
93-1801-15	28(d)
93-1901-9	43(d)
93-2301-1 to 93-2301-7, inclusive	27(a)

Repealing Clause

Section 84 of Ch. 13, Laws 1961 read
 "Section 84. That section 93-2303; section
 93-2801; section 93-2805; section 93-2811;
 section 93-2812; section 93-2816; section
 93-2818; section 93-2821; section 93-2822;
 sections 93-2824 through 93-2826; section
 93-2828; section 93-2905; section 93-3003;
 section 93-3006; section 93-3007; sections
 93-3013 through 93-3015; section 93-3017;
 section 93-3018; sections 93-3101 through
 93-3103; sections 93-3201 through 93-3203;
 sections 93-3301 through 93-3306; section
 93-3401; section 93-3402; section 93-3404;

section 93-3405; section 93-3408; sections
 93-3410 through 93-3412; section 93-3415;
 sections 93-3501 through 93-3506; sections
 93-3601 through 93-3604; section 93-3701;
 sections 93-3801 through 93-3803; sections
 93-3806 through 93-3808; sections 93-3811
 through 93-3813; sections 93-3815 through
 93-3819; section 93-3820 as amended by
 chapter 16, Laws of Montana, 1953; sec-
 tions 93-3901 through 93-3905; section
 93-3907; section 93-3909; section 93-4120;
 section 93-4701; sections 93-4703 through
 93-4705; section 93-4708; section 93-4709;
 section 93-4801; section 93-4902; section
 93-4904; section 93-4905 as amended by
 chapter 84, Laws of Montana, 1949; sec-
 tion 93-4906; section 93-4908; section 93-
 4909; sections 93-5012 through 93-5014;
 subsection (5) of section 93-5101; section
 93-5111; section 93-5201; section 93-5202;
 section 93-5301; section 93-5303; sections
 93-5401 through 93-5403; sections 93-5405
 through 93-5407; sections 93-5410 through
 93-5412; section 93-5502; section 93-5605;
 section 93-5701; section 93-5703; section
 93-8007 as amended by chapter 75, Laws
 of Montana, 1959; sections 93-8008 through
 93-8010; section 93-8201; section 93-8301;
 section 93-8401; section 93-8403; sections
 93-8501 through 93-8504; section 93-8507;
 section 93-8607; section 93-8705; section
 93-1501-5; sections 93-1801-1 through 93-
 1801-3; section 93-1801-4 as amended by
 chapter 9, Laws of Montana, 1953; sec-
 tions 93-1801-5 through 93-1801-16; section
 93-1901-9; sections 93-2301-1 through 93-
 2301-7, and all acts and parts of acts in
 conflict herewith are hereby repealed."

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**DOES NOT
CIRCULATE**

